No. 73-1971

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the district court (App. A, *infra*) is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order of October 4, 1972, Ex Parte 281, *Increased Freight Rates and Charges, 1972* (App. D, *infra*),[1] is reported at 341

[1] In reprinting this order in Appendix D, we have omitted the lengthy, detailed discussion of commodity groups not

I.C.C. 290. Its order of May 2, 1973 (App. E, *infra*) is not reported.

JURISDICTION

The judgment of the three-judge district court was entered on February 19, 1974. Notices of Appeal to this Court were filed by the Interstate Commerce Commission and the United States on April 19, 1974 (App. C, *infra*). On June 13, 1974, Mr. Chief Justice Burger extended the time for docketing the appeal to and including July 2, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742.

QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from approving a general railroad rate increase without first conducting a thorough analysis of the underlying rate structure in an environmental impact statement, improperly interfered with the Commission's discretion to determine the appropriate type of proceeding in which to address complex questions relating to rate-making.

2. Whether NEPA requires that a new hearing be conducted to consider an environmental impact state-

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involved in this proceeding, and Appendices containing financial data and future evidentiary requirements. We are lodging ten copies of the entire order with the Clerk for distribution to the Court.

ment, where the sole agency decision makers conducted a hearing and considered environmental issues before reaching their decision.

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commis-

sion may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, provides in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local

agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * *

STATEMENT

This appeal is a further chapter in a long and complex litigation involving the impact of the National Environmental Policy Act of 1969, 42 U.S.C. 4332 (NEPA), on a general revenue proceeding of the Interstate Commerce Commission conducted pursuant to Section 15(7) of the Interstate Commerce Act, as amended, 49 U.S.C. 15(7).[2]

Faced with sharply escalating costs and an increasingly precarious financial condition, the Nation's railroads in December 1971 collectively petitioned the Commission for authorization to file a temporary 2.5 percent surcharge on nearly all freight rates. This emergency interim measure was intended to redress the railroads' financial condition pending the railroads' filing of proposed permanent selective rate increases.

The Commission, finding the railroads to have a critical need for additional revenues, concluded that the surcharge should be permitted to take immediate effect. The railroads then filed proposed selective

[2] See *United States* v. *S.C.R.A.P.*, 412 U.S. 669; *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

permanent increases averaging 4.1 percent. On April 24, 1972, the Commission issued an order pursuant to Section 15(7) of the Interstate Commerce Act, instituting an investigation into the lawfulness of the permanent rate increases and suspending the permanent increases for seven months, the maximum period permitted by 49 U.S.C. 15(7).[3]

Thereafter, a group of law students—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)—and other environmental groups filed suit alleging that a detailed statement on the environmental impact of the proposed action was required by Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C). Plaintiffs sought an injunction both to prevent the railroads from collecting the 2.5 percent surcharge, and to compel the Commission to suspend its order authorizing the surcharge to become effective without suspension.

The district court granted the relief sought. *S.C.R.A.P.* v. *United States*, 346 F. Supp. 189, 201 (D. D.C.). On appeal, however, this Court reversed, holding that under Section 15(7) of the Interstate Commerce Act the Commission has exclusive power to suspend rates pending final decision on their lawfulness, and that "NEPA was not intended to repeal by implication any other statute." *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 694.

[3] Since the suspended permanent tariffs were intended to supplant the temporary surcharge, the Commission authorized the railroads to continue to collect the 2.5 percent surcharge until November 30, 1972—the end of the suspension period on the selective increases.

Before this Court rendered its opinion, the Commission, on September 27, 1972, issued a final report and order authorizing some of the selective permanent increases sought by the railroads. *Ex parte* 281, *Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290 (App. D, *infra*).[4]

In its opinion, the Commission considered the environmental impact of its authorization of the rate increases, both in general (App. D, *infra*, pp. 20d-35d), and as applied to specific commodities moving in the recycling process (App. D, *infra*, at pp. 49d-85d).[5] After this "extensive consideration" (*United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 683, n. 11), the Commission made the threshold assessment that "increases at the levels authorized herein will have no significant adverse impact on the quality of our human environment" (App. D, *infra*, at p. 34d). Therefore, it found that a formal environmental impact statement was unnecessary. Nevertheless, the Commission delayed the effectiveness of the increases authorized for commodities moving in the recycling process for 25 days, to permit the filing of comments concerning the environmental impact of the increased rates on these commodities (App. D, *infra*, p. 35d).

[4] The authorized rates for several of the recyclable materials were less than those sought by the railroads. (See App. D, *infra*, pp. 85d-86d).

[5] This consideration was based on independent study by the Commission, as well as the draft impact statement previously filed by the railroads requesting the increases and comments of shippers and environmental groups (App. D, *infra*, pp. 21d-23d).

Several such comments were filed, and, on November 7, 1972, the Commission reopened the proceeding to reconsider the environmental effects of the rates on commodities being transported for recycling, and suspended the tariffs on such commodities for another seven months. See *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 683, n. 11.

Although not conceding that an impact statement was necessary, the Commission issued its draft impact statement on March 5, 1973, for public comment. After consideration of comments, the Commission adopted the final impact statement, again concluding that the selective tariff increases on commodities moving in the recycling process would not adversely affect the environment (346 I.C.C. 88).[6] It therefore found it unnecessary to reconsider the general revenue order of October 4, 1972, and terminated the proceeding (App. E, *infra*, p. 1e).

S.C.R.A.P., the other environmental groups, and certain scrap dealer associations thereupon filed this suit, seeking to vacate the Commission's orders permitting increased rates on recyclable materials on

[6] We are lodging ten copies of this statement with the Clerk for distribution to the Court. It contains a thorough discussion of general environmental considerations (95-136, 235-236); a detailed discussion of the possible diversion from rail to truck caused by increased rates (*id.* at 136-143); and an extensive commodity-by-commodity analysis of the effect that the proposed increases will have on the shipping and use of recyclable materials (*id.* at 143-216). The Commission also discussed the various possible alternatives to rate increases on recyclable commodities. (*id.* at 218-235).

the ground that the Commission had failed to comply with NEPA.[7] The three-judge district court concluded, with Judge Flannery dissenting, that "not only the Commission's preparation and utilization of its impact statement but also the contents of that statement fail to comport with the obligations imposed on the Commission by Section 102(2)(C) [of NEPA]" (App. A, *infra*, p. 39a). It vacated the Commission's orders of October 4, 1972 and May 2, 1973, insofar as they related to commodities being shipped for recycling, and remanded for reconsideration of the rate increases applicable to such commodities.[8]

The district court's decision was purportedly based, not on substantive review of the Commission's orders, but on the court's conclusion that the Commission had failed to comply with the procedural requirements of NEPA. There were, in the court's view, two major procedural defects. The court held the statement's

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[7] They also sought an injunction restraining the railroads from collecting the increased rates on such materials. The district court originally granted this injunction; it was stayed by the Chief Justice, and then vacated by this Court, which remanded the case for reconsideration in light of *Atchison, Topeka, & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U.S. 800. *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

[8] The court refused to enjoin the collection of the higher rates by the railroads, noting that "The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases 'is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. * * *' Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*" (App. A, *infra*, p. 44a, n. 50).

fundamental defect to be that it limited its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (App. A, *infra*, at p. 34a). In addition, it held that the Commission was required to hold a hearing after the development of the impact statement, to provide a basis for a "thorough reconsideration" by the Commission "of the proposed recyclable rate increase in light of that hearing and the impact statement" (*id.* at p. 28a).

The court remanded the case to the Commission, directing it to prepare a new draft impact statement containing a thorough-going rate structure study on the relationship of recyclables to virgin materials (App. A, *infra*, pp. 39a-40a). The court also directed the Commission to conduct an analysis of the effects of the rate structure on investment in manufacturing facilities which make intensive use of scrap (*id.* at p. 40a). Furthermore, the district court found a "strong presumption" that "full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission" (*id.* at pp. 42a-43a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important questions concerning the effect of NEPA on agencies with rate-making responsibilities and, more generally, on the discretion of agencies to determine the manner in which to make decisions. In determining that the Commis-

sion's environmental consideration was inadequate because it did not analyze in detail the underlying rate structure, but focused instead on the rate increases which were involved in the revenue proceeding, the court intruded into the area traditionally reserved to agency discretion. NEPA was not intended to limit a rate-making agency's authority to determine the appropriate type of proceeding in which to make its decisions. Nor was the provision in Section 102(2)(C) that the impact statement "shall accompany the proposal through the existing agency review processes" designed to require an agency to conduct a new hearing in the circumstances of this case.

1. The Commission's Consideration of Environmental Factors Was Adequate.

The Commission orders involved here grew out of a general revenue proceeding, initiated by the railroads' proposal to increase all their rates and charges by about 4 percent. In general revenue proceedings, the Commission determines whether the carriers' total revenues are sufficient to provide the Nation with adequate transportation. If the carriers demonstrate that the general revenue increase is needed and the Commission determines that it is consistent with the public interest, the Commission will authorize a permissive revenue increase. In such proceedings, the Commission does not determine the reasonableness of individual rates, nor does it consider the relationship of rates for different classes of commodities. Instead, the Commission makes broad findings balancing the railroads' need for revenue and the public interest. On the basis of these findings, it may allow the carriers to file tariffs embodying percentage increases.[9]

The Commission's decision, however, does not automatically increase any individual rate. If the railroad does decide to amend its tariffs, the Commission's determination means, instead, that a shipper challenging any individual rate increase which is within the percentage increase authorized in the general revenue proceeding must establish that the rate is unreasonable. The effect of the general revenue order is thus simply to shift the burden of proof concerning the reasonableness of individual rates that comply with the order from the carrier to the shipper.

General revenue orders are in the nature of emergency relief to enable the railroads to keep up, to some extent, with inflationary pressures, and thus to protect the public interest in adequate rail service.[10] Therefore, the Commission may suspend the effec-

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[9] Commission orders in general revenue proceedings have traditionally not been subject to judicial review. See, *e.g.*, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C.), affirmed *per curiam* by an equally divided court *sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73. Cf. *Atchison, Topeka, & Santa Fe R. Co.* v. *Wichita Board of Trade, supra*, 412 U.S. at 814, n. 10.

[10] The precarious financial state of the nation's railroads, particularly in the northeast, is documented in the Commission's October order (App. D, *infra*, pp. 3d-20d). The Regional Rail Reorganization Act of 1973, 87 Stat. 985, reflects similar concerns.

tiveness of the increases proposed by the railroads for only seven months. If the Commission study is not completed within that time, the rates go into effect without Commission authorization. 49 U.S.C. 15(7); see *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658.[11] NEPA has not altered this statutory scheme. *United States* v. *S.C.R.A.P.*, 412 U.S. 669.

The decision of the court below would, as a practical matter, deny the railroads the benefit of timely general revenue orders. If such an order cannot issue without an environmental impact statement which analyzes not only the effects of the general revenue increases under consideration, but also the basic rate structure upon which they are predicated, no such order could be issued by the Commission within the statutory seven months. Indeed, the Commission is well aware of the need for a thorough study of the basic railroad freight rate structure, and is in fact now conducting such a study in a different proceeding, Ex Parte No. 270, *Investigation of the Rail Freight Structure.* That study includes, as a separate proceeding (Sub. No. 5), a study of the rate structure on iron and steel scrap, the principal commodity at issue here. But such studies cannot be made within the statutory time frame re-

[11] If the Commission has not acted within the suspension period, the Commission may require the carriers to keep detailed accounts and to repay any increases the Commission ultimately disallows. 49 U.S.C. 15(7); *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 697.

quired for general revenue orders. Environmental Impact Statement, p. 227.[12]

In sum, the district court's insistence that the Commission must, in effect, undertake comprehensive rate structure analyses and adjustments before it can authorize general revenue relief both misconceives the nature of general revenue proceedings and casts grave doubt on the Commission's ability effectively to respond to the carriers' revenue needs and public interest considerations within the statutorily limited suspension period. As this court noted in reviewing another district court's attempt to require the Commission to resolve complex rate-related questions in an inappropriate proceeding (*American Lines* v. *L. & N. R. Co.*, 392 U.S. 571, 592):

> Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record

[12] The district court's opinion clearly contemplates that extensive studies of this nature will be conducted in order to prepare the impact statement. It suggests that the Commission may wish to "place a moratorium on rate increases on recyclable commodities until Ex Parte No. 270 is completed" (App. A, *infra*, pp. 37a-38a)—an alternative expressly rejected by the Commission (Impact Statement, p. 230). Moreover, the rather substantial discussion of the rate structure now contained in the impact statement was considered insufficient. See Impact Statement at pp. 102-133, 146-160, 222-228, and *passim*.

for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.*, at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

Cf. *Wichita Board of Trade*, *supra*, 412 U.S. at 819-821.

The fact that this case, unlike *American Lines*, involves the application of NEPA does not justify

the district court's action. The purpose of NEPA is to ensure that the administrative decision maker gives full consideration to the environmental aspects of its decision. So long as the decision maker has taken the "hard look" at environmental consequences mandated by Congress, courts should not interject themselves into "the area of discretion of the [agency] as to the choice of the action to be taken." *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 838 (C.A.D.C.). As this Court held in *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 697, NEPA does not give reviewing courts license to upset the "careful accommodation of the various interests involved" in Section 15(7) of the Interstate Commerce Act.[13]

The district court specifically disavowed any intent to review the merits of the Commission's environmental decision, and based its action instead on a holding that the Commission had failed to comply with the procedural requirements of NEPA (App.

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[13] In a somewhat similar situation, two courts of appeals have recently concluded that the Atomic Energy Commission did not violate NEPA when it issued reactor licenses after considering environmental impact statements which were based on interim safety criteria. The courts held that the agency could develop definitive criteria in a separate rule-making proceeding without suspending all licensing in the interim. *Ecology Action* v. *United States Atomic Energy Commission*, 492 F.2d 998, 1002 (C.A. 2); *Union of Concerned Scientists* v. *Atomic Energy Commission*, C.A.D.C. No. 73-1099, decided June 10, 1974, slip op. 24-30.

A, *infra*, p. 22a).[14] It thus did not explicitly reach the question of the proper scope of judicial review of the merits of agency determinations under NEPA. Nevertheless, in concluding that the detailed impact statement here involved was inadequate, the court substituted its judgment for that of the agency concerning the matters discussed in the impact statement, and found that the arguments of the environmental interests, principally concerning the underlying rate structure, were not adequately rebutted for purposes of the issuance of a general revenue order (App. A, *infra*, pp. 30a-34a). Regardless of the particular formulations of the proper scope of judicial review of the merits of agency NEPA decisions, it is clear that such substitution of judicial for agency judgment is improper. See, *e.g.*, *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (C.A. 9); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (C.A.D.C.); *Upper Pecos Ass'n* v. *Stans*, 452 F.2d 783 (1233 (C.A. 10). And it is especially unwarranted where, as here, it would force the agency to use a particular type of proceeding for purposes for which it is not suited under the agency's regulatory scheme.

2. NEPA Does Not Require the Commission to Conduct a New Hearing to Consider the Impact Statement.

The district court concluded that, since Section 102 (2)(C) of NEPA provides that the agency environ-

[14] The court thus implicitly rejected the Commission's express determination that an impact statement was not necessary.

mental impact statement "shall accompany the proposal through the existing agency review processes," it was improper for the Commission to consider the formal impact statement without conducting a new hearing, and that there is "at least * * * a strong presumption * * * that full consideration of the revised impact statement through 'existing agency review processes' must entail oral hearings before the Commission" (App. A, *infra*, at pp. 42a-43a). But oral hearings before the Commission are not required in rulemaking proceedings of the kind involved here. See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-758; *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 236-238. And NEPA does not change that aspect of the Commission's procedures. *United States* v. *S.C.R.A.P.*, *supra*, 412 U.S. at 694. There is, therefore, no legal basis for the court's "presumption."

The court relied for its conclusion upon *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission*, 449 F.2d 1109 (C.A. D.C.), and *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (C.A. 2), certiorari denied, 409 U.S. 849. Those cases dealt with fundamentally different types of agency proceedings, in which initial agency decisions were subject to review within the agency. They hold only that in those circumstances Section 102(2)(C) requires the impact statement to be considered at each level of agency review.[15] In contrast, here the initial agency decision

[15] In *Harlem Valley Transportation Association and Natural Resources Defense Council, Inc.* v. *Stafford*, C.A. 2, No. 73-2496, decided June 18, 1974, the court held that *Greene County*,

on general revenue matters is by the Commission itself; no intermediate agency decision makers are involved, nor are there here any agency review procedures. Instead, the Commission simply reconsidered its order of October 4, 1972, in light of the environmental impact statement, and concluded that the further study of the environmental effects of the rate increases showed no reason to revise the conclusions it there reached. Cf. *Life of the Land* v. *Brinegar*, 485 F.2d 460 (C.A. 9).[16]

In the absence of any "existing agency review processes", therefore, there was no violation of Section 102(2)(C), which does not in terms require a hearing to be conducted. Nor was there any inconsistency here with the policy of NEPA, since the agency decision makers have taken the necessary "hard look" at environmental factors in reaching their decision,[17] both by extensive consideration of

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supra, applies to Commission rail abandonment proceedings conducted pursuant to 49 U.S.C. 1(18). The court apparently assumed that such proceedings, like those in *Greene County* and *Calvert Cliffs'*, must be heard initially by a hearing examiner and reviewed by the Commission. The government has not yet decided whether to seek further review of *Harlem Valley*.

[16] In *Life of the Land*, the draft impact statement was circulated after the hearing required by the agency's statute had been held. The final statement was then approved by responsible agency officials. The court concluded that the publication and dissemination of the statement complied with Section 102(2)(C). It emphasized that there had been substantial consideration of environmental issues at all stages of the proceedings.

[17] *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A. D.C.); cf. *Upper Pecos Ass'n, Inc.* v. *Stans*, 452 F.2d 1233, 1236 (C.A. 10); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (C.A. D.C.).

environmental matters at the hearing before the October 4 decision, and in reviewing the environmental impact statement and the comments thereon before reaching their May 2 decision.[18] There was also adequate opportunity for public participation, both in the October hearing and in the request for comments on the draft impact statement. Cf. *Hanly* v. *Kleindienst*, 471 F.2d 823, 836 (C.A. 2), certiorari denied, 412 U.S. 908.

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[18] The Commission's action here was thus not inconsistent with what the court in *Harlem Valley, supra*, slip op. at 4287-4288, identified as "the policies behind the decision in *Greene County I*, the dangers that an agency will rely on self-serving statements by an applicant and will place the burden of analyzing environmental issues upon intervenors * * *." The environmental questions were addressed independently by the Commission both before and after the October 4 order. See n. 5 *supra*; Impact Statement, pp. 92, 102.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JULY 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF,

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF,

and

ENVIRONMENTAL DEFENSE FUND, ET AL., PLAINTIFF-INTERVENORS,

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., ET AL., PLAINTIFF-INTERVENORS,

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

Feb. 19, 1974

Proceeding in which environmental groups and others sought a declaration that ICC had failed to

comply with National Environmental Policy Act in authorizing railroad rate increases on shipment of recyclables and that orders approving increases were void, an order enjoining the ICC to reconsider general rate increases in accordance with strict demands of the Act, and an injunction forbidding railroads from collecting rate increases on recyclables until ICC complied with the act. On plaintiffs' and defendants' cross motions for summary judgment, a three-judge United States District Court for the District of Columbia, J. Skelly Wright, Circuit Judge, determined that the ICC's efforts to meet the commands of the Act were substantially deficient, that order authorizing rate increases should be vacated, and that proceeding should be remanded to the Commission for fulfillment of the Act's obligations, but, because of uncertainty concerning meaning of a Supreme Court decision, refrained from issuing an injunction restraining railroad's collecting the increased rates pending the ICC's reconsideration.

Order accordingly.

Flannery, District Judge, dissented and filed opinion.

1. Commerce § 152

Three-judge federal district court had jurisdiction to review Interstate Commerce Commission's compliance, in authorizing railroad rate increases on shipment of recyclable commodities, with commands of the National Environmental Policy Act. 28 U.S.C.A. §§ 1336, 2321-2325; Interstate Commerce Act, §§ 13

(1), 15(1, 7), 16(1), 49 U.S.C.A. §§ 13(1), 15(1, 7), 16(1); National Environmental Policy Act of 1969, §§ 101, 102, 102(2)(C), 42 U.S.C.A. §§ 4331, 4332, 4332(2)(C).

2. Health and Environment § 25.10

Purpose of procedural requirements of National Environmental Policy Act, which prescribes not only what considerations must be addressed in an environmental impact statement but also how the statement is to be developed and utilized, is to insure that federal agencies integrate consideration of potential environmental impacts of their contemplated actions with the policy considerations traditionally attending such actions. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

3. Health and Environment § 25.10

In light of facts, inter alia, that ICC's order explaining why national transportation policy warranted general rate increase on recyclables was made without benefit of an impact statement, that ICC prepared environmental statement only after an avalanche of criticism from environmental groups, that ICC did not decide to start over again to reconsider fully question of such rate increases and instead merely opened case for limited purpose of further evaluating environmental effects of increased rates on movement of recyclables, and that ICC did not even take its after-the-fact environmental considerations through existing agency review processes, ICC's prep-

aration and utilization of its impact statement failed to comport with obligations imposed on it by National Environmental Policy Act. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

4. Health and Environment § 25.10

A reviewing court must demand more than pro forma compliance with section of National Environmental Policy Act prescribing what considerations must be addressed in an environmental impact statement and how statement is to be developed and utilized; it must be assured that the agency engaged in a full and good faith individualized consideration and balancing of environmental factors. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

5. Health and Environment § 25.10

ICC statement on environmental impact of railroad rate increases on shipment of recyclables, which failed to include, inter alia, an analysis of underlying rate structure's impact on movement of recyclables, failed to comport with obligations imposed on the ICC by the Environmental National Policy Act. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

6. Health and Environment § 25.10

Phrase "existing agency review processes," in section of National Environmental Policy Act which re-

quires that environmental impact statement be transmitted through existing agency review processes, encompasses not only procedures required by explicit agency regulations but also those procedures which an agency customarily employs in consideration of a proposal of the type being analyzed for its environmental impact. National Environmental Policy Act of 1969, § 102(2)(C), 42 U.S.C.A. § 4332(2)(C).

See publications Words and Phrases for other judicial constructions and definitions.

John F. Banzhaf, III, and Peter H. Meyers, Washington, D.C., for plaintiff SCRAP.

John F. Dienelt and Scott H. Lang, Washington, D.C., for plaintiff-intervenors Environmental Defense Fund and others.

Edward L. Merrigan, Washington, D.C., for plaintiff-intervenors National Association of Secondary Materials Industries, Inc. and others.

Thomas H. Boggs, Jr., George Blow, and E. Bruce Butler, Washington, D.C., for plaintiff-intervenors Institute of Scrap Iron and Steel, Inc., and others.

Asst. Atty. Gen. Shiro Kashiwa, Harold H. Titus, Jr., U. S. Atty., and William M. Cohen, Atty., Dept. of Justice, for defendant United States of America.

Fritz R. Kahn, Gen. Counsel, Betty Jo Christian, Associate Gen. Counsel, and Theodore C. Knappen, Hanford O'Hara, Charles H. White, Jr., and James F. Tao, Attys., Interstate Commerce Commission, for defendant Interstate Commerce Commission.

T. A. Miller, San Francisco, Cal., Albert B. Russ, Jr., Richmond, Va., Edward A. Kaier, Philadelphia, Pa., and Charles A. Horsky, Michael Boudin, Michael J. Henke, Walter Hellerstein and James L. Tapley, Washington, D.C., for defendant-intervenors Aberdeen and Rockfish Railroad Company and others.

Before WRIGHT, Circuit Judge, and RICHEY and FLANNERY, District Judges.

J. SKELLY WRIGHT, Circuit Judge:

Plaintiff and plaintiff-intervenors challenge an order of the Interstate Commerce Commission (ICC) authorizing railroad rate increases on shipment of recyclable commodities on the ground that the Commission has failed to comply with the prescriptions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970). Both plaintiffs and defendants have moved for summary judgment. We find that the Commission's efforts to meet the commands of NEPA were substantially deficient. We thus vacate the Commission's order authorizing the rate increases on recyclable commodities and remand the proceeding to the Commission for fulfillment of its NEPA obligations. However, because of our uncertainty concerning the meaning of the Supreme Court's decision last term in Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973), we refrain from issuing an injunction restraining the railroads from collecting the increased rates pending the Commission's reconsideration.

I

This case has had a long and complicated history. Inasmuch as it has produced two previous opinions[1] by this court[2] and one by the Supreme Court,[3] however, we shall attempt to set forth only those facts relevant to the motions now before us. Having secured Commission approval of a two and a half per cent temporary emergency surcharge in February 1971 on nearly all freight rates, the nation's railroads on March 17, 1972 filed tariffs with the Commission for permanent selective increases averaging four per cent on most commodities. Under the Interstate Commerce Act tariff changes filed by carriers go into effect automatically unless the Commission deems that an investigation of the lawfulness of these tariffs is advisable and that the rates should be suspended pending such an investigation. 49 U.S.C. § 15(7) (1970). On April 24, 1972 the Commission announced its intention to investigate the permanent increases and suspended these increases for the full seven-month period permitted by Section 15(7).

Students Challenging Regulatory Agency Procedures (SCRAP) then commenced this action, contending that NEPA compelled the Commission to prepare and consider an environmental impact statement be-

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[1] 353 F.Supp. 317 (1973); 346 F.Supp 189 (1972).

[2] This is a three-judge court convened pursuant to 28 U.S.C. §§ 2325 & 2284 (1970).

[3] United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

fore permitting any rate increases—including the temporary two and a half per cent surcharge. SCRAP, which was later to be joined by other environmental groups and scrap dealer associations,[4] argued that the rate increases discouraged the environmentally desirable use of recyclable commodities not only by raising the costs of shipping recyclables, but also by aggravating "the preexisting disparity in shipping costs between these materials and the primary goods with which they compete." [5] In response to this theory, we held that even the temporary surcharge was a major action "significantly affecting the quality of the human environment," 42 U.S.C. § 4332 (2)(C), and that the Commission therefore had violated NEPA by not preparing and considering a NEPA impact statement before issuing its order permitting the temporary surcharge. We held that any challenge to the permanent increase was not ripe for review inasmuch as the Commission had not then yet issued an order approving this increase. We did, however, retain jurisdiction to ensure that the Commission would comply with NEPA.[6] We further issued a preliminary injunction restraining the temporary surcharge insofar as it applied to recyclable commodities. The Supreme Court reversed the injunction on June 18, 1973. United States v. SCRAP, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Relying on Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), the Court held that Section 15(7) vested exclusive jurisdiction in the Commission to suspend rates pending its final decision on their lawfulness.[7]

Meanwhile the Commission's investigation of the proposed permanent increases culminated in a hearing consisting of submission of briefs and oral argument by concerned parties. Though the Commission had told the Chief Justice, in connection with its application for a stay of our order against the temporary surcharge, as well as this court, that it was developing an impact statement, no statement was prepared for consideration at this hearing or even for consideration by the Commission before issuing its decision on the permanent increases. That decision, which was issued October 4, 1972, approved most of the selective increases. Ex Parte No. 281, Increased Freight Rates and Charges, 1972, 341 ICC 288 (1972). The decision included some discussion of environmental considerations and limited the rate increases on *nonferrous* scrap to three per cent, but

[4] SCRAP, an unincorporated association of law students, was formed to enhance environmental quality. The Environmental Defense Fund, the National Parks & Conservation Association, and the Izaak Walton League of America entered the action in its initial stages as plaintiff-intervenors. The National Association of Secondary Materials Industries and the Institute of Scrap Iron & Steel have more recently intervened. All of these parties will be referred to hereinafter as plaintiffs.

[5] 346 F.Supp. at 191.

[6] *Id.* at 198-201.

[7] 412 U.S. at 690-699, 93 S.Ct. 2405.

it generally concluded that the new tariffs would not significantly affect the quality of the human environment and that there was thus no necessity for a formal impact statement. The Commission's failure to prepare a formal statement provoked vehement protestations from the President's Council on Environmental Quality (CEQ), from the Environmental Protection Agency (EPA), and from plaintiffs.[8] Plaintiff SCRAP filed with this court on November 7, 1972 a motion to enjoin the approved increases. On the same day as this filing, the Commission suddenly shifted its position by suspending, until June 1973, rate increases on all goods being shipped for purposes of recycling and by reopening its investigation in Ex Parte No. 281.[9] The Commission stated that the proceeding was reopened for "the limited purpose of further evaluating, in accordance with [NEPA],

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[8] "* * * The Environmental Protection Agency (EPA) stated its regret that the Commission chose not to submit a formal impact statement, arguing that 'the historical data presented by the Commission does not support the conclusion that * * * there will be no adverse environmental impact.' CEQ, in its letter to the Commission, felt that the conclusion that the October 4 order would have no significant environmental impact 'seems unresponsive to the language of our NEPA guidelines * * *.'"

353 F.Supp. at 321.

[9] Following the Commission's Oct. 4 order and opinion, the railroads refiled their increases, including the increases on recyclables, in accordance with the order and the exceptions they made to the Commission's general approval. It was these refiled tariffs as they related to recyclables which the Commission suspended.

the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling * * *." [10] In light of the Commission's action, we denied SCRAP's request for a preliminary injunction. We found that no relief was necessary for the suspended increases on recyclables and that there was not sufficient likelihood that the plaintiffs would be successful in showing that an impact statement was required before increasing rates on nonrecyclables. We reserved decision on the merits.

The Commission proceeded to prepare its statement on the environmental impact of the recyclable rate increases. The Commission's draft statement was issued March 5, 1973. It was circulated to several concerned Executive agencies and departments and to all of the parties in this action. Not only the plaintiffs but also the Executive agencies and departments, including EPA, CEQ, General Services Administration, Department of the Interior, and Department of Commerce, responded with extensive comments critical of this draft statement and its conclusions. These comments, although acknowledged by the Commission in its final statement, did not move the Commission to change in any substantial way its conclusions or even its analysis. The Commission denied the request of plaintiffs to schedule a new set of hearings in the reopened proceedings. The Commission served its final environmental impact state-

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[10] 353 F.Supp. at 321.

ment on May 7, 1973. The statement's analysis was limited to the marginal impact of the most recent rate increases; it stated that a general rate increase proceeding did not provide an appropriate occasion to examine whether the underlying rate structure discriminated against recyclable commodities with significant adverse environmental consequences.[11] Though it contained no rigorous economic analysis of the responsiveness of the demand for recyclables to changes in transportation costs, the statement's conclusion echoed the Commission's original position in its October 1972 order that the increases would not have a significant adverse effect on the environment. The statement further pronounced that even if some adverse environmental impact could be anticipated [12] the increases would be justified by the need to ensure a viable and efficient railroad system. The Commission did not use this staff-prepared statement and the critical comments on the draft statement to develop a new opinion to supplant or even supplement its October opinion. Instead the Commission merely appended a one-sentence order to the statement's back page which adopted the entire statement as part of its prior opinion on the rate increases and discontinued Ex Parte No. 281.

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[11] ICC, Ex Parte No. 281, Increased Freight Rates and Charges, 1972 (Environmental Matters) 22 (May 7, 1973) (hereinafter "Environmental Impact Statement").

[12] The statement actually did concede at one point that the rate increase would probably cause a decline in utilization of glass scrap. *Id.* at 155.

On May 30, 1973 SCRAP and plaintiff-intervenor Environmental Defense Fund (EDF) filed a motion in this court for a preliminary injunction against the rate increases on recyclable commodities which the railroads intended to place in effect when the suspension period ended on June 10. On June 7 this court, finding a sufficient likelihood that plaintiffs would be successful in their present challenge to the rate increases, issued a temporary injunction restraining the Commission and the railroads from collecting the increases "until further order of this court." This injunction was stayed by Chief Justice Burger. On November 19, 1973 the Supreme Court vacated the injunction and remanded the case to this court for further consideration in light of Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*.[13]

Plaintiffs now ask this court for: a declaration that the ICC has failed to comply with NEPA and that the orders approving the increases are thus void; an order enjoining the Commission to reconsider the general rate increases in accordance with the strict demands of NEPA; and an injunction forbidding the railroads from collecting the rate increases on recyclables until the Commission does so comply with NEPA. Plaintiffs and defendants have filed cross motions for summary judgment, and on these motions we now consider whether it is appropri-

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[13] United States v. SCRAP, —— U.S. ——, 94 S.Ct. 533, 38 L.Ed.2d 326 (1973).

ate for this court to grant plaintiffs' requests for relief.

II

[1] We must first address the contention of the railroads, who have intervened as defendants, that we lack jurisdiction to review the Commission's compliance with the commands of NEPA. The railroads' position is based on cases dating back almost 40 years which refused to review challenges of shippers to general revenue orders like those of October 4, 1972 and May 2, 1973.[14] These decisions were not compelled by any statutory limitation on the courts' power; three-judge District Courts have jurisdiction "to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission * * *." 28 U.S.C. § 2321 (1970); 28 U.S.C. § 1336 (1970). *See* 28 U.S.C. §§ 2322-2325 (1970). The decisions were instead predicated upon the judicially developed doctrines of ripeness and exhaustion of administrative remedies. The courts stressed that the Commission's approbation of a general rate increase under Section 15(7) was merely

[14] *See, e.g.*, Algoma Coal & Coke Co. v. United States, E.D.Va., 11 F.Supp. 487 (1935); Koppers Co. v. United States, W.D.Pa., 132 F.Supp. 159 (1955); Atlantic City Electric Co. v. United States, S.D.N.Y., 306 F.Supp. 338 (1969), and Alabama Power Co. v. United States, D.D.C., 316 F.Supp. 337 (1969), *both affirmed by equally divided Court*, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970); Electronic Industries Assn v. United States, D.D.C., 310 F.Supp. 1286 (1970), *affirmed per curiam*, 401 U.S. 967, 91 S.Ct. 1188, 28 L.Ed.2d 318 (1971).

an acceptance of the railroads' need for more revenue, that the shippers could challenge the reasonableness of particular rates affecting them under Sections 13(1), 15(1) and 16(1) of the Interstate Commerce Act, 49 U.S.C. §§ 13(1), 15(1), 16(1) (1970), and that only in a decision pursuant to such a challenge did the Commission render a judgment on the reasonableness of particular rates as applied to particular shippers. The courts thus reasoned that to review carriers' challenges to a Section 15(7) order would be to interfere at an intermediate stage in the rate-making process before the carriers had exhausted their remedies before the Commission.

However, as we indicated in our first opinion in this case,[15] we do not feel restrained by these cases from reviewing plaintiffs' challenges to the Commission's orders. First, the precedential force of the cases is now in substantial doubt. Two of the most recent, Alabama Power Co. v. United States, D.D.C., 316 F.Supp. 337 (1969), and Atlantic City Electric Co. v. United States, S.D.N.Y., 306 F. Supp. 338 (1969), were affirmed without opinion by only an equally divided Court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970). Only last term the Court indicated that the jurisdictional question presented by these cases, while a serious one, was not settled.[16]

[15] 346 F.Supp. at 198.

[16] In Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973); the Court reviewed a Commission order that particular rates were just and reasonable. The plurality opinion stated that

In *Alabama Power* and *Atlantic City* the shippers' challenges were directed to the Commission's decision that the general increases were warranted by the railroads' revenue needs rather than to the reasonableness of any particular rates. We adhere to the view expressed in the dissent in *Alabama Power* that challenges such as these can best be considered in direct review of the Commission's Section 15(7) decision rather than "in countless rate-making proceedings involving individual commodities." [17] The instant case does not present challenges to the reasonableness of particular rates on particular railroads between particular points; it presents challenges to the Commission's determination that the railroads' general revenue needs justify the costs to shippers and to the environment of a general rate increase on recyclables.[18] The Commission has made what it believes to be its final decision on this general balancing; it surely does not intend to reconsider this decision after a Section 13 challenge to a particular rate.

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if the grain charges "were just like a general rate incrase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order." *Id.* at 814 n. 10, 93 S.Ct. at 2378.

[17] Alabama Power Co. v. United States, *supra* note 14, 316 F.Supp. at 339.

[18] We thus find misplaced the railroads' reliance on Electronic Industries Assn v. United States, *supra* note 14, which was affirmed unanimously by the Supreme Court without opinion. In that case the shippers attacked as unreasonable and arbitrary only that portion of a Commission § 15(7) order permitting increased rates on two particular items. 310 F.Supp. at 1287.

We do not, however, rest on an application of the analysis advanced in the dissent in *Alabama Power*. For as stated in our first *SCRAP* opinion [19] the cases cited by the railroads are all distinguishable from a case challenging the Commission's compliance with NEPA in approving a general rate increase. We first note that however adequate a Section 13 proceeding might be to a shipper who questions the railroads' need for a general rate increase, it is at least questionable that environmental groups such as SCRAP have standing to initiate Section 13 proceedings during which they could attempt to contest the Commission's compliance with NEPA. Sections 13(1), 15(1) and 16(1) permit any person or association to complain of carrier action in contravention of the Interstate Commerce Act and empower the Commission to investigate such complaints and remedy any violation of the Act, including granting reparations for unreasonable or prejudicial charges on particular items shipped. It is suggested that an environmental group, while it could not obtain reparations, should be able to complain that a particular charge on a particular item is unreasonable because of its environmental effects. Thus if SCRAP could initiate an investigation on this theory, it could argue further that before rejecting the complaint the Commission would have to prepare and consider an environmental impact statement. But we know of no Commission order or judicial opinion accepting this theory and it is thus too speculative and too unrealistic to support a denial

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[19] 346 F.Supp. at 198.

of jurisdiction. It is true that two scrap dealers associations have intervened in this action to help champion the environmental cause and that these associations or their members may bring Section 13 challenges to particular rates which they could argue the Commission could not reject without compliance with NEPA. But we cannot rest a holding on the fortuity that here shippers as well as environmental groups challenge the Commission's compliance with NEPA. Moreover, to refuse to consider the challenges of environmental groups to agency compliance with NEPA because economically interested parties might make similar challenges in later proceedings would significantly dilute the Supreme Court's holding, on review of our first opinion in this case, that SCRAP has full standing, equal to and not derived from the standing of economically interested parties, to seek review of Commission action which allegedly harms SCRAP's members in their use of the environment.[20]

Even if environmental groups could initiate proceedings pursuant to Section 13(1), an appeal from a Commission order on the reasonablenes of a particular rate would not be an appropriate time for a court to review the Commission's challenged compliance with NEPA. Plaintiffs have persuasively argued that NEPA compels the Commission, before approving a general rate increase, to consider whether the rate increases on recyclables collectively have a significant environmental impact and, if so, whether

[20] United States v. SCRAP, *supra* note 3, 412 U.S. at 683-690, 93 S.Ct. 2405.

this impact is justified by the railroads' need for increased revenues. These are far different questions from whether a particular rate, in light of environmental considerations, is unreasonable or discriminatory. Even if a court in reviewing a Commission order on the reasonableness of a particular rate were able on the record before it to review the Commission's compliance with NEPA, the court's decision would affect only the particular rate challenged. Thus burdensome relitigation of each particular rate would be required to challenge all the rates which collectively impact the environment. Finally, we note that delay is of greater import here than in previous cases where review of general rate orders was refused. While the Act provides for reparations to shippers who successfully challenge particular rates after they have become effective, the environmental degradation which continues while challenges to particular rates are being considered may not be reparable at all.

Our reliance on NEPA in finding jurisdiction is not inconsistent with the Supreme Court's admonition in its SCRAP opinion that "NEPA was not intended to repeal by implication any other statute."[21] The Court did not suggest that NEPA was to be ignored by the courts in considering threshold jurisdictional issues.[22]

[21] *Id.* at 694, 93 S.Ct. at 2419.

[22] The Court's implicit approval of the assertion of jurisdiction in Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971), suggests much

The Court in *SCRAP* held only that NEPA did not revive judicial power that had been previously explicitly eliminated by Congress. 412 U.S. at 692-695, 93 S.Ct. 2405. This time we do not wield NEPA in the face of any statutory limitations on our jurisdiction; there is nothing in the Interstate Commerce Act which precludes our jurisdiction to review Section 15(7) orders, whatever the limits it imposes on our injunctive power over carriers. We, like the previous courts which, in a non-NEPA context, declined to review general rate orders, are applying broad jurisdictional provisions, 28 U.S.C. §§ 1336, 2321, giving us power to review "any order" of the ICC. These provisions demand supplementation by other statutes and by judicially developed doctrines which limit court review of agency action. As stated above, previous courts found two of these doctrines to preclude court review of general rate orders. We find that the existence of NEPA requires us to reconsider the application of these doctrines and in NEPA cases to accept more of the broad jurisdictional authority granted us.

III

We thus turn to an examination of the Commission's fulfillment of the NEPA mandate. We do not feel it necessary to rehearse at the outset the full

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the reverse. 412 U.S. at 695-696, 93 S.Ct. 2405. The *Seaborg* court reviewed whether a decision to conduct a nuclear test was made in compliance with NEPA though, as we noted in our first *SCRAP* opinion, 346 F.Supp. at 197, absent NEPA no court would have authority to review such a decision.

structure and the particularized requirements of NEPA. Previous courts have done so adequately.[23] We do, however, think it important to emphasize before commencing our analysis that the courts have required strict compliance with the procedural commands of NEPA. Section 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C), prescribes in some detail not only what considerations must be addressed in an environmental impact statement, but also how the statement is to be developed and utilized. The Act states that "all agencies of the Federal Government" are to comply with these prescriptions "to the fullest extent possible." 42 U.S.C. § 4332. Far from providing "an escape hatch for footdragging agencies," this language "sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." Calvert Cliffs' Coordinating Committee v. USAEC, 146 U.S.App.D.C. 33, 38, 449 F.2d 1109, 1114 (1971). Because of the extent of plaintiffs' attack on the impact statement, we further note that the courts' substantive review of agency action pursuant to NEPA is much more limited. Once a court is satisfied that the agency has "fully and in good faith" met all of NEPA's procedural requirements, it should not reverse an agency decision on the merits unless it can determine that the decision was "arbitrary or clearly gave insufficient weight to

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[23] *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Engineers, United States Army, 8 Cir., 470 F.2d 289 (1972); Calvert Cliffs' Coordinating Committee v. USAEC, 146 U.S. App.D.C. 33, 449 F.2d 1109 (1971).

environmental values." *Id.*, 146 U.S.App.D.C. at 39, 449 F.2d at 1115.[24] Any substantive review would be predicated on Section 101 of the Act, 42 U.S.C. § 4331, which propounds certain substantive environmental goals which it is the "continuing responsibility of the Federal Government to use all practicable means" to achieve. One of these goals is to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." However, because we view the Commission's efforts to comply with NEPA's procedural commands to be sorely deficient, we do not reach the question whether the Commission clearly gave insufficient weight to this environmental value.

[2, 3] The purpose of all the requirements imposed by Section 102(2)(C) is to ensure that federal agencies integrate consideration of the potential environmental impacts of their contemplated actions with the policy considerations traditionally attending such actions. It is for this reason that Section 102(2)(C) specifically commands that an environmental impact statement and the comments of other concerned agencies on this statement "shall accompany the proposal through the existing agency review processes." The Commission's mode of preparation and utilization of the challenged impact statement here violated both Section 102(2)(C)'s fundamental pur-

[24] *Accord*, Conservation Council of North Carolina v. Froehlke, 4 Cir., 473 F.2d 664, 665 (1973); Environmental Defense Fund, Inc. v. Froehlke, 8 Cir., 473 F.2d 346, 353 (1972).

pose and this specific command. The Commision's October 4 order explaining why the national transportation policy warranted the general rate increase was made without the benefit of an impact statement. It was only after its October order was greeted with an avalanche of criticism from environmental groups, EPA, and CEQ that the Commission decided to prepare an environmental statement on the impact of the rate increases for recyclable commodities. The Commission did not, however, decide to start over again to reconsider fully the question of rate increases on recyclables. It instead merely reopened Ex Parte No. 281 "for the limited purpose of further evaluating * * * the environmental effects of increased railroad freight rates and charges" on the movement of recyclable commodities. ICC order of November 7, 1972. The Commission thus indicated that it had already made its decision and all that remained was to determine if the environmental effects of that decision could be justified. The Commission's May 2, 1973 order discontinuing Ex Parte No. 281 is further evidence that the Commission neither intended to give nor actually gave full reconsideration to the question of the recyclable rate increase. That one-sentence order merely adopts the entire staff-prepared impact statement. It makes no attempt to integrate the considerations of national transportation policy justifying the rate increase with the environmental considerations analyzed in the impact statement. Nor does it confront or even acknowledge the critical comments of other concerned agen-

cies and environmental groups appended to the statement. This utilization of an impact statement simply does not comport with Section 102(2)(C). Only if the statement is prepared before an agency decision is made can it serve its purpose of informing the decision-making process at every stage. "Compliance to the '*fullest*' possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process * * *." Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App.D.C. at 42, 449 F.2d at 1118 (emphasis in original).[25] If the agency fails to pre-

[25] *See also* Environmental Defense Fund, Inc. v. Armstrong, N.D.Cal., 352 F.Supp. 50, 55 (1972) (an impact statement "is not to be merely an exercise in project justification but rather a working paper of sorts, one essential input into agency decisions concerning the contours of Federal action").

In his dissent to the Court's reversal of our first *SCRAP* opinion, Mr. Justice Douglas quotes Congressman Dingell, a main sponsor of NEPA. That quotation unfortunately is even more appropriate at this stage of the *SCRAP* litigation.

> "* * * Some agencies are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind. I am fearful that we are breeding a race of impact statement writers who put all the right words down but don't really get environmental concerns involved in the decision-making process. * * *"

United States v. SCRAP, *supra* note 3, 412 U.S. at 713 n. 10, 93 S.Ct. at 2429. CEQ must have been aware of this problem in drafting its advisory guidelines on agency compliance with NEPA. These guidelines state:

> "* * * It is important that draft environmental statements be prepared and circulated for comment and

pare an impact statement before making a decision significantly affecting the environment, it must start its procedures over again, including the procedure required by Section 102 of NEPA, so that the decision-making process can be fully informed throughout.

In this case, not only did the Commission fail to start over in considering whether to approve the rate increases, it did not even take its after-the-fact environmental consideration through the entire "existing agency review processes." The "processes" for Commission review of proposed general rate increases are set forth in Section 15(7) of the Interstate Commerce Act. The Commission is empowered by the section to make orders concerning these proposed rates "after full hearing." The Commission held a hearing before its October 4 order before it had even commenced preparing an impact statement. It refused, however, to hold another hearing to reconsider the increase on recyclables it had already decided upon in light of the impact statement it had prepared. It should be clear to all agencies by now that hearings are key aspects of agency review processes during

> furnished to the Council as early as possible in the agency review process in order to permit agency decisionmakers and outside reviewers to give meaningful consideration to the environmental issues involved. In particular, agencies should keep in mind that such statements are to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made. * * *"

38 Fed.Reg. 10858 (1973).

which environmental impact statements must be considered. The words of the Court of Appeals for the Second Circuit are clear:

> "* * * [W]e conclude that the Commission was in violation of NEPA by conducting hearings prior to the preparation *by its staff* of its own impact statement * * *. * * *
>
> "* * * [T]he statement may well go to waste unless it is subject to the full scrutiny of the hearing process * * *."

Greene County Planning Board v. FPC, 2 Cir., 455 F.2d 412, 422 (1972) (emphasis in original). And the words of the Court of Appeals for the District of Columbia Circuit are equally clear:

> "The question here is whether the Commission is correct in thinking that its NEPA responsibilities may be 'carried out in toto outside the hearing process'—whether it is enough that environmental data and evaluations merely 'accompany' an application through the review process, but receive no consideration whatever from the hearing board."

Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App.D.C. at 41, 449 F.2d at 1117. The railroads attempt to distinguish *Greene County* and *Calvert Cliffs'* by stressing that in those cases the agency hearings produced an examiner or hearing board report as an initial stage in the decision-making process, while in a general revenue proceeding the first and only decision is that of the Commission itself. But there is nothing in either of the cases,

or more importantly in Section 102(2)(C), to indicate that, because a stage in the review process during which the proposed action is considered does not culminate in an intermediate agency opinion, that stage may be circumvented for purposes of NEPA. Indeed where, as here, the hearing is before the Commission itself, and is the only one provided, it may well be the most important stage in the decision-making process.

The Commission attempts to defend its refusal to hold hearings during which the impact statement could have been considered by arguing that those with environmental concerns had adequate opportunity to comment on the approval of the rate increase. The Commision primarily refers to the oral hearing held prior to the October order during which environmental comments were in order and to the Commission's solicitation of comments on the draft environmental statement. Neither can substitute for strict compliance with the commands of Section 102(2)(C). During the oral hearing held prior to the October order there was no impact statement, draft or otherwise, upon which environmentally concerned parties could focus their comments; nor was there any statement to inform the Commission as to the worth of any environmental comments which were made. The comments on the draft statement, prepared subsequent to the October order, were directed to and considered by the agency staff members who prepared the statement. Section 15(7) hearings are to be held by the Commission itself and are a stage

at which the Commissioners can be informed of environmental considerations. They thus constitute an independent and important stage in the agency review process.

IV

[4] If what we have discussed above was all that was wrong with the Commission's compliance with Section 102(2)(C)'s requirements, it might be sufficient for the Commission to hold another hearing in which all parties could participate fully in canvassing the NEPA and national transportation policy considerations concerned with rate increases. The Commission could then make a thorough reconsideration of the proposed recyclable rate increase in light of that hearing and the impact statement which it has already prepared. However, we find the statement itself to be deficient and to require repreparation. The statement seems to meet the prescriptions of NEPA as to form; it has sections, for instance, on the five considerations which NEPA requires agencies to address in their statements. However, as we stated above, a reviewing court must demand more than *pro forma* compliance with Section 102(2)(C); it must be assured that the agency engaged in a full and good faith "individualized consideration and balancing of environmental factors." Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S. App.D.C. at 39, 449 F.2d at 1115.[26] We perused the

[26] "Compliance with NEPA is not established merely by the filing of an impact statement in the form and by the procedure outlined by the statute." Brooks v. Volpe, W.D.Wash., 350 F.Supp. 269, 275 (1972). *See also* City of New York v. United States, E.D.N.Y., 344 F.Supp. 929, 940 (1972); Environmental Defense Fund, Inc. v. Corps of Engineers, United States Army, E.D.Ark., 342 F.Supp. 1211, 1214 (1972); cases cited at note 23 *supra* (all requiring "good faith" compliance).

statement carefully and cannot find that it presents such a full and good faith consideration and balancing. This conclusion is not surprising given the above-recounted history of the statement's post-decision preparation.

We note first that a reader of the statement must be struck by the combative, defensive and advocatory language and style in which it is written. The statement continually attacks the views of those opposing the increase, denominating these "one-dimensional" [27] and impaired by "syndromes." [28] One report is slighted merely because it was prepared by urban groups [29] and EPA is chided for needing a course in the fundamentals of rate regulation.[30] Nowhere does the statement set forth an environmental argument against the rate increase as its own or as worthy of even partial acceptance; environmental arguments are ascribed to others and then rebutted.[31] The state-

[27] Environmental Impact Statement, *supra* note 11, at 11-12.

[28] *Id.* at 14.

[29] *Id.* at 10.

[30] *Id.* at 194.

[31] To this extent at least, the statement is not in accord with CEQ's advisory guidelines that a statement is not to "be used as a promotional document in favor of the proposal, at the expense of a thorough and rigorous analysis of environmental

ment's defensiveness, and the Commission's insensitivity to its NEPA responsibilities, are even manifested at one point by an assertion that NEPA does not require any balancing of environmental costs: "[W]e find in [NEPA] no Congressional expression that we should invalidate railroad rate proposals otherwise shown by the proponents to be just and reasonable under the Interstate Commerce Act." [32] To be sure, a court probably would not declare a statement to give less than full and good faith consideration on the basis of its language and style alone. But we deem this language and style to be at least evidentiary of the fullness and the fairness of the agency's consideration.

More important to our judgment on the adequacy of the impact statement is its handling of the comments made on the draft statement. Section 102(2)(C) states:

> "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. * * *"

42 U.S.C. § 4332(2)(C). The Commission circulated a draft statement not only to several concerned Executive agencies and departments, but also to the par-

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risks." CEQ Memorandum to Federal Agencies on Procedures for Improving Environmental Impact Statements, 3 Env.Rep. —Cur.Dev. 82, 84 (May 19, 1972).

[32] Environmental Impact Statement, *supra* note 11, at 185.

ties in this action. Most of the recipients of the statement responded with extensive critical comments. The Commission appended these comments to the back of its final statement and in some instances made arguments against the criticisms within the body of this final statement. None of these comments, however, caused the Commission to alter even partially its conclusions or to change the statement's analysis in any noticeable way. We find the Commission's failure to alter its draft impact statement in response to three of the critical comments of other federal agencies particularly troublesome.

First, it was suggested by the Department of Commerce and EPA that a quantitative and thorough economic study be made on the responsiveness of the demand for secondary materials to changes in transportation costs. The final statement criticizes the methodology of a privately commissioned study which concludes that the development of scrap iron markets is being retarded by the transportation rate structure.[33] But the statement does not offer any rigorous price sensitivity studies of its own.[34] Instead it relies

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[33] Battelle Columbus Laboratories, Summary Report on the Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap 2 (Jan. 14, 1972) (hereinafter "Summary Report").

[34] It is not, of course, sufficient under NEPA for an agency to dismiss the environmental impact studies of opponents of the proposed action. It is the agency's responsibility to engage itself in the study necessary to gauge environmental effects. "The requirement that the statement be detailed places a heavy burden on government agencies to gather for and include in the impact statement enough information to

on general discussions of past scrap demand trends. For instance, it bases its conclusion that the challenged increases will have no significant impact on demand for iron scrap primarily on the concurrence of past scrap demand and rate increases.[35] We find the statement's reliance on this concurrence troublesome because it ignores the fact that the demand for primary goods was also increasing during the period of past rate increases and the possibility that scrap demand would have increased even more if rates on iron scrap had been held down. It is difficult for us to understand how the statement can conclude that there is no significant environmental impact without a quantitative study of the responsiveness of the demand for each type of scrap to changes in recyclable transportation costs.

Second, EPA, which placed the statement in its "inadequate" category, suggested that a Department of Transportation Burden Study establishes that at least some secondary materials are contributing more revenue over costs than do the virgin materials with which they compete.[36] The statement, however, does

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show that compliance has been genuine, not perfunctory. * * * NEPA requires each agency to undertake the research needed to adequately expose environmental harms." Brooks v. Volpe, *supra* note 26, 350 F.Supp. at 276, 279.

[35] The statement asserts at one point that a price-sensitivity study is not required because of the concrete evidence of this concurrence. Environmental Impact Statement, *supra* note 11, at 72 n. 14a.

[36] Dept. of Transportation, An Estimation of the Distribution of the Rail Revenue Construbtion by Commodity Groups and Type of Rail Car—1969 (Jan. 1973).

not provide any comprehensive alternative analysis of the relative cost contribution of secondary and primary materials; it shows only that one type of scrap is not disadvantaged within one area relative to its competing virgin material.[37] The statement also speculates as to why the rate disparities might be cost-justified and stresses that railroad pricing is not in any case totally cost-based; it does not, however, present a rigorous analysis of what justifies the specific disparities between primary and secondary rates. We think that if the transportation costs do affect the demand for recyclable commodities, the impact statement must establish the particular justifications for the rate disparities.

Third, both EPA and CEQ criticized the draft statement for failing to consider the impact of the rate increase on long-term investment in facilities which can make fuller productive use of recyclables. The final statement was not modified in response to this criticism. Though in explaining why transportation rates have little impact on scrap demand the statement repeatedly makes reference to the technological and capital constraints on the use of scrap, the statement does not make any economic analysis of whether a hold down on recyclable rate increases might encourage the investment necessary to overcome these constraints. The statement does not, for instance, respond to one study's conclusion that the rate differential between iron ore and scrap iron plays a "crucial and negative" role in the decision of

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[37] Environmental Impact Statement, *supra* note 11, at 51.

steel manufacturers to invest in facilities such as electric arc furnaces which can produce steel using all scrap and no virgin iron ore.[38]

The final statement's failure to address adequately the above three criticisms of the draft statement can be derived from what we view as its most fundamental and important deficiency—the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment. The statement makes this limitation of its analysis explicit:

> "It is contended that our approval of increased rail rates and charges on commodities moving for recycling purposes will serve to aggravate discrimination already allegedly in the railroad freight rate structure, to the detriment of recyclable commodities and the national recycling effort. * * *
>
> "* * * [S]uch a case does not provide an appropriate vehicle for examining these issues. * * *"

Environmental Impact Statement at 22. We fail to understand how any consideration of the environmental impact of approving the recyclable rate increases could be full without an analysis of how the underlying rate structure itself affects the environment. It is the underlying rate structure which the percentage increases aggravate; if this structure contributes to the degradation of our environment,

[38] Summary Report, *supra* note 33, at 24.

then the increases would at least presumptively aggravate that contribution. It is not enough to respond that whether a substantial rate disparity significantly affects the environment is not determinative of whether a marginal increase of that disparity itself has any significant impact. Any impact on the underlying structure could be eliminated by holding down recyclable rate increases each time the railroads requested a general rate increase.[39] The Commission's failure to hold down the rate increases on recyclables would thus have a cumulative impact on the environment. Such cumulative impacts must be considered in NEPA statements. The Senate report on the passage of NEPA makes this clear:

> "* * * Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."

S.Rep. No. 91-296, 91st Cong., 1st Sess., 5 (1969). The advisory guidelines for implementation of NEPA issued by CEQ are responsive to this congressional intent:

[39] As stated by EPA in criticism of the final impact statement. "There is evidence that the current rate structure is inequitable in its treatment of some secondary materials and general rate increases tend to perpetuate these inequities." Letter from Acting Deputy EPA Administrator John Quaries to ICC Secretary Robert L. Oswald dated June 6, 1973.

> "* * * The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further actions contemplated). * * * In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable. * * *"

38 Fed. Reg. 10857 (1973).[40] We suspect that if the Commission had recognized that it was obligated to consider the environmental impact of the underlying rate structure it would have had much greater difficulty justifying even to itself the deficiencies in analysis upon which we focused above. For example, absent an elasticity study the statement would not have been able by citing past trends in scrap usage to dismiss the possibility that the underlying rate structure affected the amount of recyclables transported.[41]

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[40] Courts have thus made it clear that agencies may not seize upon the concept of "distinctive and comprehensive" stages of decision-making to escape impact statement preparation on the ground that early action such as laying the first section of roadbed of a new highway will entail little environmental impact in itself. *See, e.g.*, Citizens for Clean Air, Inc. v. Corps of Engineers, United States Army, S.D.N.Y., 349 F.Supp. 696, 708 (1972).

[41] The Commission argues that if we agree with the statement's conclusion that the recyclable rate increases will not have a significant impact on the environment, no impact statement was required in the first place and we can uphold the Commission's orders regardless of any findings we might make of failures to comply with the prescription of § 102(2)(C). We find this line of reasoning questionable. An acceptance of the Commission's argument would encourage agencies to avoid any explicit environmental balancing by concluding in impact statements that proposed actions have no significant environmental effects. However, because the statement's limited definition of the environmental impact it considers prevents us from accepting its conclusion of no significant impact, we do not need to reach this argument.

The Commission argues that an ongoing comprehensive investigation into the railroads' freight rate structure, Ex Parte No. 270, justifies its failure to consider the environmental impact of the underlying rate structure. That investigation, having been delayed for several years, finally seems to be commencing,[42] though there apparently is some question whether this investigation will reconsider rate levels for recyclable commodities other than ferrous scrap.[43] However, regardless of how near to completion and comprehensive this study may be, it cannot substitute for the detailed impact statement which NEPA requires to be prepared *before* federal action significantly affecting the environment is taken, not in reconsideration of that action. The investigation in Ex Parte No. 270 did not and could not inform the Commission's decision-making process with respect to the rate increase on recyclables.[44] If the Commis-

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[42] *See* 38 Fed.Reg. 28596 (1973).

[43] *See id.* at 28600.

[44] The Commission has effectively admitted both in the impact statement and in a later order that it needs to be more

sion desires to utilize analyses developed in the Ex Parte No. 270 investigation in preparing an adequate impact statement, it should, as suggested by CEQ and Commissioner Brown,[45] place a moratorium on rate increases on recyclable commodities until Ex Parte No. 270 is completed.

The necessity for the Commission to consider the environmental impact of the underlying rate structure before approving rate increases on recyclable commodities is further underscored by the recent enactment of Public Law 93-236, 93rd Congress, the

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fully informed on the environmental impact of the underlying rate structure. The final impact statement asserts that neither the costs nor the benefits of utilizing the freight rate structure "as a mechanism to allocate the costs of a recycling program * * * have been established." Environmental Impact Statement, *supra* note 11, at 192. In its notice on the recommencement of Ex Parte No. 270, the Commission stated through Commissioner Hardin:

> "*It further appearing*, that while the 1969 burden study discloses that iron and steel scrap is one of the top twenty positive revenue contributors for movements within official territory, iron ores are similar [*sic*] disclosed for movements within official territory to be one of the top twenty deficit contributors to railroad net revenues;
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> * * * *
>
> "*And it further appearing*, that there are presently available insufficient facts and data to enable the Coordinator properly to assess and quantify the environmental consequences of the numerous alternatives that may be pursued in the investigation program envisioned in this proceeding as required by the NEPA * * *."

38 Fed.Reg. 28600 (1973) (italics in original).

[45] Environmental Impact Statement, *supra* note 11, at 213.

Regional Rail Reorganization Act of 1973. Section 603 of this Act requires the Commission to "adopt appropriate rules" to "eliminate discrimination against the shipment of recyclable materials in rate structures * * * where such discrimination exists." This provision is a legislative recognition of discrimination against recyclables in the existing railroad rate structure and a legislative direction to the Commission to eliminate it. The responsibility imposed by NEPA upon the Commission to "approach the maximum attainable recycling of depletable resources," 42 U.S.C. § 4331(b)(6), surely cannot be fulfilled unles this provision is complied with before rate increases on recyclable commodities are approved.

V

[5] We thus conclude that not only the Commission's preparation and utilization of its impact statement but also the contents of that statement fail to comport with the obligations imposed on the Commission by Section 102(2)(C). We vacate the Commission's October 4, 1972 and May 2, 1973 orders and direct the Commission to reopen the Ex Parte No. 281 proceedings for full consideration of the proposed rate increases on recyclable commodities.

The Commission should first prepare another draft statement to be circulated as specified by Section 102(2)(C). This new statement must include an analysis of the underlying rate structure's impact on the movement of recyclable commodities. The analysis would presumably entail a determination of the elas-

ticity of demand with respect to the price for each of several categories of recyclable commodities. The statement should also include an analysis of the effects of the rate structure on investment in manufacturing facilities which can make intensive use of scrap. Whatever impact of the rate structure on the short- and long-term demand for scrap is found should be translated into terms which meaningfully relate the environmental effects of the rates and rate increases. These effects are not necessarily limited to conservation of natural resources and elimination of solid wastes. For example, a recent EPA report states that 74 per cent less energy and 51 per cent less water are expended and 86 per cent less air pollution and 97 per cent less mining wastes are engendered when scrap iron is used in lieu of virgin ore in the production of steel.[46] All the environmental effects must be balanced against the costs, if any, to the national transportation policy of attemping to alleviate the effects by not increasing the rates.[47] Though we are aware that railroad rates are not totally cost-based, an analysis of the costs of not raising the rates would presumably include a consideration of whether the scrap shippers are now

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[46] U. S. Environmental Protection Agency, Report to Congress on Resource Recovery 8 (Feb. 22, 1973).

[47] "In some instances environmental costs may outweigh economic and technical benefits and in other instances they may not. But NEPA mandates a rather finely tuned and 'systematic' balancing analysis in each instance." Calvert Cliffs' Coordinating Committee v. USAEC, *supra* note 23, 146 U.S.App.D.C. at 37, 449 F.2d at 1113.

bearing more than their "fair share" of the railroads' freight expenses. A comprehensive study of the contribution to costs made by each category of recyclable commodities and the primary goods with which they compete will thus probably be necessary.

[6] After comments are received on the draft statement, a final statement should be prepared. This detailed statement shall then "accompany the [consideration of the proposed rate increase] through the existing agency review processes." As we have stressed above, in this case that review process includes a hearing before the Commission. Plaintiffs have argued that this hearing must be governed by Sections 556 and 557 of the Administrative Procedure Act (APA), 5 U.S.C. §§ 556, 557 (1970), and that they thus must be given the opportunity to cross-examine those staff members responsible for preparation of the statement. We cannot agree. Rate-making, involving basically legislative-type judgments, is a form of rule-making which is governed by Section 553, rather than Sections 556 and 557, of the APA. *See* United States v. Florida East Coast R. Co., 410 U.S. 224, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973). Section 53(c) states: "When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply * * *." 5 U.S.C. § 553(c) (1970). But the Supreme Court, in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-758, 92 S. Ct. 1941, 32 L.Ed.2d 453 (1972), held that the words "after hearing" in another similar provi-

sion of the Interstate Commerce Act do not invoke Section 553(c) and thus Sections 556 and 557. "Sections 556 and 557 need be applied 'only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be "on the record."'" *Id.* at 757, 92 S.Ct. at 1950. *See also* United States v. Florida East Coast R. Co., *supra*, 410 U.S. at 234-238, 93 S.Ct. 810. We also find nothing in the existing regulations of the Commission requiring a full adjudicatory hearing. And inasmuch as NEPA requires only that the impact statement be transmitted through the *existing* agency review processes, we follow previous courts in refraining from holding that the Act requires an adjudicatory hearing where agency procedures do not provide for one.[48] We think, however, that "existing agency review processes" should be interpreted to encompass not only procedures required by explicit agency regulations but also those procedures which an agency customarily employs in consideration of a proposal of the type being analyzed for its environmental impact. In this case, when the general rate increase was first being considered without an impact statement, oral hearings were held before the Commission. This fact at least establishes a strong presumption for us that full consideration of the revised impact statement through

[48] *See, e.g.*, Jicarilla Apache Tribe of Indians v. Morton, 9 Cir., 471 F.2d 1275, 1285-1286 (1973); National Helium Corp. v. Morton, 10 Cir., 455 F.2d 650, 656-657 (1971); City of New York v. United States, *supra* note 26, 344 F.Supp. at 939-940.

"existing agency review processes" must entail oral hearings before the Commission.[49]

After hearings are held, a final revised order should be issued manifesting a full reconsideration by the Commission of the rate increase on recyclables. This order should not be limited to adoption of the impact statement; it should include a reassessment of the national transportation policy supporting the original October order as well as a discussion of the final impact statement prepared by the Commission's staff and of the comments on the draft statement solicited from other concerned agencies.

[49] We further think that a strong argument could be made that oral public hearings should be held based on the CEQ advisory guidelines which state:

> "(e) Agency procedures developed pursuant to section 3(a) of these guidelines shall include provision for public hearings on actions with environmental impact whenever appropriate, and for providing the public with relevant information, including information on alternative courses of action. In deciding whether a public hearing is appropriate, an agency should consider: (i) The magnitude of the proposal in terms of economic costs, the geographic area involved, and the uniqueness or size of commitment of the resources involved; (ii) the degree of interest in the proposal, as evidenced by requests from the public and from Federal, State and local authorities that a hearing be held; (iii) the complexity of the issue and the likelihood that information will be presented at the hearing which will be of assistance to the agency in fulfilling its responsibilities under the Act; (iv) the extent to which public involvement already has been achieved through other means, such as earlier public hearings, meetings with citizen representatives, and/or written comments on the proposed action. * * *"

38 Fed.Reg. 10858 (1973).

VI

This does not, however, end the case. Plaintiffs do not merely ask for a declaration that the Commission violated the prescriptions of NEPA and an order directing it to reopen Ex Parte No. 281 for reconsideration of the recyclable rate increases in accordance with these prescriptions. They also request that we enjoin the railroads from collecting the rate increments on recyclable materials until the Commission completes its full reconsideration. Such an injunction would be necessary to hold down the rates on recyclables; under the scheme established by the Interstate Commerce Act new tariffs filed by carriers are effective absent a Commission order finding the tariffs unreasonable. *See* 49 U.S.C. §§ 6(3), 15 (1) (1970).[50]

As stated above, on June 7, 1973 we entered a temporary injunction against the railroads restraining them from collecting the rate increases pending our review of the Commission's October 4 and May 2 orders. The Supreme Court vacated this injunction and remanded the case to this court for reconsideration in light of its decision last term in Atchi-

[50] The only consequence of our vacating the Commission's orders pending reconsideration of the rate increases "is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases." Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra* note 16, 412 U.S. at 818, 93 S.Ct. at 2380.

son, Topeka & Santa Fe R. Co. v. Wichita Board of Trade, *supra*. Though it is far from clear that that decision prevents us from granting plaintiffs further injunctive relief, it raises substantial enough doubts concerning the propriety of such relief to stay our hand.

We first note that our entering an injunction against the railroads is not precluded by the Court's reversal of our first injunction in this case—the injunction entered against the 2.5 per cent surcharge pending Commission consideration of the lawfulness of rate increases. In that reversal the Court held that Section 15(7) gave exclusive jurisdiction to the ICC to suspend rates pending its final decision on their lawfulness. United States v. SCRAP, *supra*, 412 U.S. at 690-691, 93 S.Ct. 2405. Now, however, unlike the time at which we issued our injunction against the surcharge, the Commission has issued what it at least thought was its final order on the rate increases. And in *Wichita Board of Trade*, decided the same day as *SCRAP*, a majority of the Court stated that the terms of Section 15(7) do not govern a case in which the Commission has issued what it intends to be its final order. 412 U.S. at 820, 826-828, 93 S.Ct. 2367. Moreover, this *Wichita* majority affirmed that District Courts reviewing Commission orders must have at least some power ancillary to their general powers of review and protective of their jurisdiction to enjoin railroads from collecting new charges pending final determination of the suit. Mr. Justice Marshall, writing for four mem-

bers of the majority, noted that while three-judge District Courts are only explicitly given power to enter orders against the Commission by 28 U.S.C. § 2324 (1970),[51] " 'judicial review would be an idle ceremony if the situation were irreparably changed [by private parties] before the correction could be made.' " 412 U.S. at 819, 93 S.Ct. at 2381, quoting Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942). Here collection of the recyclable rate increases during the Commission's reconsideration may well cause further irreparable environmental degradation.[52]

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[51] The relief we grant today against the Commission is clearly not called into question by the Court's *SCRAP* or *Wichita* decisions. "Nor does anything in the Court's opinion today deny to the district courts power to enjoin the Commission to comply with NEPA * * * so long as no injunction is issued barring implementation of the rates themselves, *cf.* Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, *post*, p. 800 [93 S.Ct. 2367]." United States v. SCRAP, *supra* note 3, 412 U.S. at 724-725 n. 1, 93 S.Ct. at 2436 (opinion of Mr. Justice Marshall).

[52] The railroads argue that this is an inappropriate case to exercise the ancillary power posited by Justice Marshall because the Commission can correct any violations of NEPA without the railroads being enjoined from collecting the increases. This argument reflects a total misunderstanding of NEPA's purposes. To be sure, the commands of NEPA will not change if the railroads collect the increases while the Commission attempts to comply with these commands. But the commands exist to enhance the quality of our environment, not to test agencies' capacity to respond to congressional directives. It is irreparable environmental change with which we must be concerned if our review is to be more than an "idle ceremony."

However, Justice Marshall proceeded to state for the *Wichita* plurality that the considerations which underlay the Court's interpretation of Section 15(7) demand that the courts' ancillary power be limited. Justice Marshall's definition of the ancillary power is critical, for Mr. Justice Douglas, the fifth member of the *Wichita* majority, would detract not at all from the general power of this court to enjoin the railroad,[53] while three other members of the Court argued that District Courts lack any jurisdiction whatever to enjoin rates even after a final Commission order.[54] Justice Marshall stressed that the most important of the considerations underlying the Court's interpretation of Section 15(7) in Arrow Transportation Co. v. Southern R. Co., *supra*, the case primarily relied upon by the *SCRAP* Court, relate to the concept of agency "primary jurisdiction." This concept directs that until the agency has provided its own views a court should demur from expressing a view on matters which have been at least in part entrusted by Congress to an agency's discretion and concerning which the agency has developed some degree of expertise. Before a court issues an injunction pending final determination of a suit, it normally either implicitly or explicitly makes an estimation of the likelihood of ultimate success on the merits of the party challenging the agency action.

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[53] 412 U.S. at 826-828, 93 S.Ct. 2367.

[54] 412 U.S. at 838, 93 S.Ct. 2367 (opinion of Mr. Justice White, in which Mr. Justice Brennan and Mr. Justice Rehnquist join, concurring in part and dissenting in part).

See Virginia Petroleum Jobbers Assn v. FPC, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958). The expression of such an estimation may well pronounce the views of the court on matters such as national transportation policy which are within the agency's primary jurisdiction. A court contemplating an injunction pending final determination will further make some weighing of the magnitude and irreparability of the harms which would be suffered by the parties depending on whether an injunction is issued. *Ibid.* This weighing may also require the court to evince its beliefs on matters concerning which the agency being reviewed has primary expertise. The danger that a reviewing court issuing an injunction would thus intrude on the primary jurisdiction of the ICC moved the *Wichita* plurality to state that District Courts should not enjoin rates in order to protect their jurisdiction to review Commission orders unless they entertain "substantial doubt about the consistency of the Commission's action [on the substantive merits] with its mandate from Congress." 412 U.S. at 822, 93 S.Ct. at 2382.

Our uncertainty as to the meaning for this case of Justice Marshall's opinion has a dual origin. First, we question whether issuance of an injunction here would intrude upon the primary jurisdiction of the Commission. The injunction overturned by the *Wichita* Court was issued against the railroads' imposition of separate charges for inspection of grain in transit because the Commission's order approving such charges did not justify departure from a long-

standing rule proscribing them. In issuing the injunction the District Court thus at least implicitly had to express its view that this departure was not justified. Matters of national transportation policy are, of course, within the especial expertise of the Commission; however, we are concerned here with matters of environmental policy and there is no reason to consider the Commission especially expert on the environment. Our issuance of an injunction pending final determination would need only be a statement of our belief that a full consideration of the rate increases' environmental impact will probably lead to a conclusion that those increases must be avoided. Further, Justice Marshall stressed that the injunction in the *Wichita* case was perforce based on a weighing of the injunction's harm to carriers against its benefit to shippers. Not only does this weighing of the interests of carriers and shippers exclusively involve considerations of national transportation policy; it also must be done against the background of Section 15(7) which, by providing for repayment of charges ultimately found to be unreasonable, makes reparable any harms which might accrue to shippers should an injunction not issue. Our issuance of an injunction here would require consideration of environmental degradation for which the Interstate Commerce Act does not and unhappily probably could not provide reparation. We thus question the applicability of Justice Marshall's *Wichita* analysis to this case. Our doubts are augmented appreciably by the fact that Justice Marshall dissented

from the reversal of our first *SCRAP* opinion, advancing the same distinctions of our case from *Wichita* as we have set forth above. *See* 412 U.S. at 724, 728-732, 93 S.Ct. 2405.

But even if the analysis of the *Wichita* plurality is applicable to this case, we do not think it obvious that an injunction against the railroads would be inappropriate. Justice Marshall's *Wichita* opinion recognized that a court need not refrain from granting an injunction and thus stating its views on the merits if the court believes it would have to reverse the agency if it does not change its decision after reconsideration. We indeed do entertain "substantial doubt" about the consistency of the Commission's allowance of the rate increases with the congressional mandate that the Federal Government "use all practicable means" to "approach the maximum attainable recycling of depletable resources." 42 U.S.C. § 4331(b)(6). We indeed might well question whether the Commission can allow the recyclable rate increases without clearly giving "insufficient weight to environmental values." *See* Calvert Cliffs' Coordinating Committee v. USAEC, *supra*, 146 U.S.App. D.C. at 39, 449 F.2d at 1115. Nonetheless, out of an abundance of caution, we decline to consider further granting to plaintiffs additional injunctive relief.

The October 4, 1972 and May 2, 1973 orders are vacated and Ex Parte No. 281 is to be reopened for further proceedings consistent herewith.

So ordered.

FLANNERY, District Judge (dissenting):

The history of this protracted litigation is clearly set forth in the Court's majority opinion. That history reveals that the Supreme Court has on two occasions overruled findings of this Court on jurisdictional grounds.

I

Jurisdiction

On June 18, 1973, the Supreme Court held that this Court was without jurisdiction to issue a preliminary injunction restraining a temporary surcharge on shipping rates for recyclable commodities. The Court reasoned that section 15(7) of the Interstate Commerce Act[1] vested exclusive jurisdiction in the Interstate Commerce Commission to suspend rates, pending a final decision of their lawfulness.[2] On November 19, 1973, the Supreme Court vacated another injunction issued by this Court restraining the Commission and railroads from collecting certain rate increases on recyclable commodities, which the railroads intended to place in effect at the expiration of the statutory suspension period.[3] The case was remanded to this Court for further consideration in

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[1] 49 U.S.C. § 15(7) (1970).

[2] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

[3] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), —— U.S. ——, 94 S.Ct. 533, 38 L.Ed.2d 326 (1973).

the light of Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade.[4] These decisions by the Supreme Court clearly require this Court to reconsider its prior holdings and to determine whether it has jurisdiction in this matter.

In *Wichita*, the Supreme Court held that judicial review of Interstate Commerce Commission decisions in rate cases is limited in scope and that such decisions are not to be disturbed unless they are unsupported by evidence, are made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. Since the Commission in the present case has not yet determined that the rates in question are reasonable, this Court is clearly without jurisdiction to suspend them. Arrow Transportation Co. v. Southern Railway Co.[5] The Supreme Court in *Wichita* also pointed out that Congress, in establishing the Interstate Commerce Commission, had created an administrative agency whose function was to develop an understanding of national transportation problems and to use that expertise to determine what our national transportation policy should permit. Consequently, a court should ordinarily refrain from expressing any view on such policy before the Interstate Commerce Commission expresses its view. For this Court to issue an injunction during an ongoing administrative proceeding would be to undercut the policies served by the doc-

[4] 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973).

[5] 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963).

trine of primary jurisdiction, and would slide the Court "unconsciously from the narrow confines of law into the more spacious domain of policy." [6]

It is the established rule that general revenue orders of the Interstate Commerce Commission, such as the suspension orders directed to individual rates in this case, are not reviewable by the courts.[7] The Supreme Court has ruled in this case that N.E.P.A. was not intended to repeal by implication any other statute.[8] There is no indication that Congress intended N.E.P.A. to overrule the long line of judicial decisions holding that general revenue orders, such as those presented in this case, are not reviewable by the courts.

This Court, therefore, clearly does not have jurisdiction to enjoin the collection of the increased rates on recyclable materials. It follows that since the Commission's orders are non-reviewable at this stage,

[6] Atchison, Topeka and Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. at 807, 93 S.Ct. at 2375; Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).

[7] Alabama Power Co. v. United States, 316 F.Supp. 337 (D.D.C.), aff'd by an equally divided court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970); Electronic Industries Ass'n v. United States, 310 F.Supp. 1286 (D.D.C. 1970), aff'd per curiam, 401 U.S. 967, 91 S.Ct. 1188, 28 L.Ed.2d 318 (1971); Atlantic City Elec. Co. v. United States, 306 F.Supp. 338 (S.D.N.Y. 1969), aff'd by an equally divided court, 400 U.S. 73, 91 S.Ct. 259, 27 L.Ed.2d 212 (1970).

[8] United States v. Students Challenging Reg. Agcy. Pro. (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 2418-2419, 37 L.Ed.2d 254 (1973).

this Court is without jurisdiction to grant the relief requested.

II

N.E.P.A.

Assuming *arguendo* that the Court has jurisdiction to review the adequacy of the N.E.P.A. statement submitted by the Interstate Commerce Commission, I find the statement to be sufficient and in substantial compliance with the requirements of N.E.P.A.

The mandates of N.E.P.A. pertain to procedure. Although N.E.P.A. itself creates no substantive rights in citizens to safe, healthful, productive, and culturally pleasing surroundings, the responsible federal agency is required to take these factors into account before commencement of a project. Upper Pecos Ass'n v. Stans.[9] The record in this case reveals that the Commission gave extensive consideration to the possible environmental impact of increased rates for certain recyclable commodities. The function of this court is not to decide whether it agrees with the Commission's substantive findings but only to decide whether the record reveals that the procedure set forth in N.E.P.A. was followed and whether the Commission has fully and in good faith considered all factors mandated by N.E.P.A. The Commission in my view has substantially complied with the requirements of N.E.P.A. Based on the substantial record

[9] 452 F.2d 1233 (10th Cir. 1971).

already compiled, to remand for further hearings under N.E.P.A. would require the Commission to conduct a largely ritualistic act.

On November 7, 1973, the Commission reopened its investigation in this case for the purpose of further evaluating, in accordance with N.E.P.A., the environmental effects of increased railroad freight rates and charges on the movements of commodities being transported for the purpose of recycling. The Commission then spent several months preparing a draft statement which was issued on March 13, 1973. After soliciting and receiving the comments of interested persons and agencies the final Impact Statement was released on May 7, 1973. The comprehensive statement anticipates a potential adverse environmental effect stemming from the proposed rate increases but concludes that the increases are justified by the need to insure a viable and efficient railroad system. This Court has already recognized the financial plight of the nation's railroads.[10] The logic of the Commission's conclusion therefore seems unassailable. Moreover, it is buttressed by extensive findings which cover in detail the five categories set out in § 102 (a)-(c) of N.E.P.A. The Commission has clearly taken the "hard look" at possible environmental consequences mandated by Congress. National Resources Defense Council v. Morton.[11]

[10] Students Challenging Reg. Agcy. Pro. (SCRAP) v. United States, 353 F.Supp. 317, 323-324 (D.D.C. 1973).

[11] 148 U.S.App.D.C. 5, 16, 458 F.2d 827, 838 (1972).

Finally, the fact that the Commission's final impact statement was filed after the rates had been initially approved does not establish *per se* that the statement was biased and not issued in good faith. All that is required is that the agency make a reasonable good faith effort to comply with the procedural requirements of N.E.P.A. That the statement may have been prepared after the decision to proceed had already been made is not a fatal procedural error requiring the process to begin all over again. Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973); Upper Pecos Ass'n v. Stans, 452 F.2d 1233, 1237 (10th Cir. 1971); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972).

Even assuming technical non-compliance with N.E.P.A., if the Commission has considered all relevant environmental factors and has reached a fair and informed decision under N.E.P.A. its finding should not be set aside. First National Bank of Homestead v. Watson, 363 F.Supp. 466 (D.D.C. 1973).

For the foregoing reasons, I respectfully dissent and would hold that the motions of the plaintiffs and intervening plaintiffs for summary judgment and for injunctive relief be denied, the case be dismissed, and judgment be rendered for the defendants with normal costs.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

[Filed Feb. 19, 1974, James F. Davey, Clerk]

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF

and

ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION and IZAAK WALTON LEAGUE OF AMERICA, PLAINTIFF-INTERVENORS

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. and FRANKEL BROTHERS & CO., INC., PLAINTIFF-INTERVENORS

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

JUDGMENT

This case came on for hearing on plaintiffs' and defendants' cross-motions for summary judgment. Briefs were filed herein by the parties. The court has this day filed its opinion. On consideration thereof,

It is ORDERED that the Interstate Commerce Commission's orders of October 4, 1972 and May 2, 1973 in Ex Parte 281 are vacated and this case is remanded to the Commission for further proceedings consistent with the opinion in this case.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
United States Circuit Judge

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

District Judge Flannery dissents from the foregoing judgment.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY, INVOLUNTARY PLAINTIFF

and

ENVIRONMENTAL DEFENSE FUND, NATIONAL PARKS AND CONSERVATION ASSOCIATION and IZAAK WALTON LEAGUE OF AMERICA, PLAINTIFF-INTERVENORS

and

NATIONAL ASSOCIATION OF SECONDARY MATERIALS INDUSTRIES, INC., COMMERCIAL METALS CO., I. V. SUTPHIN CO. and FRANKEL BROTHERS & CO., INC., PLAINTIFF-INTERVENORS

and

INSTITUTE OF SCRAP IRON AND STEEL, INC. and JULIAN C. COHEN SALVAGE CORPORATION, PLAINTIFF-INTERVENORS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., DEFENDANT-INTERVENORS

NOTICE OF APPEAL

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and judgment of this Court dated February 19, 1974. This appeal is taken pursuant to 28 U.S.C. § 1253.
2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 19th day of April, 1974.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney
Interstate Commerce
Commission
Washington, D. C. 20423

FRITZ R. KAHN
General Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 971-72

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), PLAINTIFF

and

COUNCIL ON ENVIRONMENTAL QUALITY,
INVOLUNTARY PLAINTIFF

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given on this 19th day of April 1974, that the United States of America hereby appeals under 28 U.S.C. 1253 and 2101, to the United States Supreme Court from the judgment and opinion of this Court filed on February 19, 1974, in favor of plaintiffs against the defendants, vacating Interstate Commerce Commission's orders of October 4,

1972, and May 2, 1973, in Ex Parte 281 and remanding the matter to the Commission.

/s/ William M. Cohen
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APPENDIX D

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

Decided September 27, 1972

REPORT OF THE COMMISSION

BY THE COMMISSION:

BACKGROUND

By our prior report and order in this proceeding, *Increased Freight Rates and Charges, 1972*, 340 I.C.C. 358, entered December 21, 1971, we instituted a nationwide investigation into the adequacy of railroad freight rates and charges, and all railroads in the United States were made respondents. The investigation specifically included (a) a general increase by surcharge of 2.5 percent on bills for freight services (more particularly described in the above referenced report and order and in appendixes A and B thereto) which, by order served February 1, 1972, we permitted to become effective without suspension on February 5, 1972, subject to certain conditions including a requirement that the surcharge schedules expire on June 5, 1972, and (b) a general increase in rates and charges to be applied on a selective basis and which respondents indicated would be filed to supplant the surcharge. For the 4-month period

prior to its then effective expiration date of June 5, 1972, the latter increase was expected to yield additional revenue in the amount of $82 million allocated as follows: $31 million—eastern district, $14 million—southern district, and $37 million—western district.

On February 28, 1972, respondents sought permission to file and make effective on April 1, 1972, a tariff containing their selective increase proposal. By order served March 6, 1972, the requested permission was granted subject, however, to a requirement that it be filed to become effective not earlier than May 1, 1972, upon not less than 45 days' notice to the public. In accordance with that permission, respondents filed, on March 17, 1972, a selective increase tariff (designated as X-281-A) to supplant the surcharge (X-281). The level of increases therein varies between different commodities and services and between and within different territories from 0 to 10 percent; and, if fully applied, respondents anticipate a 4-percent increase in total freight revenues (or $489 million) over the presurcharge (X-267-B) level, allocated as follows: $185 million—eastern district, $72 million—southern district, and $232 million—western district.

Both the surcharge and the selective increase proposals were made subject to a provision for refunds in the event the Commission ultimately finds that no increase or a lesser increase is warranted; and, pursuant to our order of August 13, 1970 (Procedures Governing Rail Carrier General Increase Proceedings, 49 CFR 1102), respondents' initial petitions were accompanied by verified statements containing "the full and entire evidential case" relied on in support of each increase proposal.

In accordance with procedural schedules established in our orders of December 21, 1971, and March 6, 1972, numerous protests and verified statements in opposition were filed by various interested parties. Respondents filed reply verified statements, and oral hearings for cross-examination were held at Washington, D.C., beginning on March 23 and extending to April 20, 1972.

Based upon preliminary consideration of the evidence and arguments of the parties, we entered an order on April 24, 1972, suspending the selective increase proposal (tariff X-281-A and supplements thereto) in its entirety for the full 7-month period allowed by statute, or to and including November 30, 1972; and the investigation was continued. At the same time, we extended the expiration date of the surcharge tariff from June 5 to November 30, 1972.

Pursuant to our order of May 23, 1972 (served on May 24, 1972), all interested parties were invited to participate in oral argument be-

fore the entire Commission and to file briefs either supplemental to or in lieu of oral argument. In response to that order numerous briefs were filed on or before June 12, 1972, and oral argument was held on June 15 and 16, 1972.

The record before us, including written submissions and transcripts of oral hearings and oral argument, is of massive proportions and reflects the views of virtually every interest affected by the involved nationwide general freight rate increase proposals. Careful and individual attention has been given to each of those views[1] and, to the extent feasible, will be reflected in subsequent sections of this report. Due and timely execution of our functions, however, imperatively and unavoidably requires omission of the administrative law judge's report and recommended order.

Revenue Need

General.—The financial condition of the Nation's railroads has been a matter of continuous and grave concern to this Commission charged as we are with administering the Interstate Commerce Act so as to develop, coordinate, and preserve, under private ownership, a national transportation system adequate to meet the needs of the commerce of the United States. Most recently, we exhaustively reviewed and analyzed the overall revenue situation of the railroad industry in the context of general increase tariffs X-265 through X-267-B. See report served on March 23, 1971, in *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, hereinafter sometimes referred to as the prior case. We there concluded:

> that the financial condition of the railroad industry as a whole, and the financial status of many individual carriers by rail, must be found to be at a dangerously low level. The precipitous decline in working capital and serious loss of liquidity has reduced many carriers to a truly marginal operation. This has been most clearly demonstrated by the recent bankruptcy application of the Penn Central. We think it undeniable that a number of other roads are approaching a similar financial crisis. (Prior report, page 173.)

We further found that revenues which the railroads could reasonably expect to receive from rates established at the Ex Parte No. 265 level would enable them to do little more than meet added costs of

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[1]Including late-filed verified statements: (1) of the Western Wood Mouldings and Millwork Producers, and (2) of Grande Anse Peat Moss Co., Ltd., Conrad Fafard, Inc., and Annapolis Valley Peat Moss Co., Ltd.

operation in 1970 and 1971 at present levels of service; and that revenues realized from authorized Ex Parte No. 267 increases were necessary to enable the carriers to improve severely depressed earning ratios, and thereby to enhance their ability to attract investment capital for use in upgrading their equipment and facilities.

Increased Costs

Justification for the increases here proposed is based on operating cost increases not anticipated in the prior case. In effect, respondents claim that additional revenues obtained from the sought selective increases will not improve their capital base but, rather, will enable them to offset, in part, currently prevailing annualized cost levels[2] for wages and other employee benefits (including increases effective April 1, 1972), materials, supplies, State and local taxes, and additional specified items. Evidence relating to those increased costs is set forth below.

Wages.—Wage cost increases in 1971 resulted from agreements executed with nearly all rail unions providing for periodic increases in wage rates during the period January 1, 1970, to June 30, 1973.[3] The general pattern of these wage increases was established in November 1970 by Emergency Board No. 178 following its investigation of wage disputes involving four unions, viz, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Brotherhood of Maintenance of Way Employees (BMWE), the Hotel and Restaurant Employees and Bartenders International Union (H&RE) and the United Transportation Union (UTU). The board recommended increases in wage rates as follows:

January 1, 1970	5 percent
November 1, 1970	32 cents per hour
April 1, 1971	4 percent
October 1, 1971	5 percent
April 1, 1972	5 percent
October 1, 1972	5 percent

[2] Following the methodology accepted in the prior case, estimates of increased costs (except where otherwise indicated) are for a full 12-month period for all class I railroads and are based on an employment level 3.14 percent below the 1970 level and traffic at the same level as in 1970. So stated, these increases are not necessarily the same as the increases in calendar year 1971 over calendar year 1970, as the latter comparison would involve different levels of employment and would be affected by the timing of the various increases. Also, a showing of cost increases limited to only a portion of the calendar year during which they became effective would fail to indicate fully their continuing impact.

[3] Wage increases scheduled under these agreements to become effective after April 1, 1972, are not reflected in respondents' cost computations and they will not be considered herein.

This pattern was followed in subsequent legislation and agreements. Public Law 91-541, enacted December 10, 1970, to terminate a strike, made the recommended 1970 increases effective for employees represented by the BRAC, BMWE, H&RE, and UTU. The recommended increases for 1970, 1971, and 1972 were subsequently incorporated into agreements reached with the following unions:

BMWE—February 10, 1971
H&RE—February 10, 1971
BRAC—February 25, 1971
UTSE (United Transport Service Employees)—March 24, 1971
ATDA (American Train Dispatchers Ass'n.)—April 20, 1971
RYA (Railroad Yardmasters of America)—April 23, 1971
BLE (Brotherhood of Locomotive Engineers)—May 13, 1971

The same pattern of wage increases in 1970 and 1971 was embodied in final agreements reached with the UTU on January 27, 1972, and with the International Brotherhood of Firemen and Oilers (BFO) on February 11, 1972.

Agreements reached with four shopcraft unions and ratified November 13, 1971, differ only slightly from the established pattern insofar as 1971 wage increases are concerned. These agreements (with the International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths; Forgers and Helpers; and Brotherhood of Railroad Carmen of the U.S.A. and Canada) provide increases of 10 cents per hour effective January 1, 1971, 15 cents per hour for mechanics and higher rated employees and 8 cents per hour for others effective April 1, 1971, and the 5-percent pattern increase October 1, 1971.

Agreement reached November 16, 1971, ratified November 24, 1971, with the Brotherhood of Railroad Signalmen of America provides for wage increases in 1971 in conformity with the pattern of the shopcrafts' agreement.

Respondents' cost calculations for wages assume application of the shopcrafts' settlement to two shopcraft disputes not yet settled (representing about 1 percent of all employees) and application of the general increases of 4 percent April 1, 1971, 5 percent October 1, 1971, and 5 percent April 1, 1972, to all other employees.

Thus calculated, based on an employment level 3.14 percent below that of the year 1970, wage increases effective January 1 and April 1, 1971, represent payroll costs of $253 million a year, and the

October 1, 1971, and April 1, 1972, increases involve annual costs of $305 and $320 millions, respectively. Also, actual wage increases in 1970 are shown to have exceeded estimates relied upon in the prior case by $271 million.

Additional cost increases in wage-related items include $63 million annually in payroll taxes resulting from a statutory increase (from $650 to $750) in the maximum amount of monthly pay subject to tax for retirement and medicare, and a $99-million increase annually in health and welfare expense, became effective March 1, 1972. The latter represents the increased cost of renewal of the existing group policy contract, plus $1.22 monthly per covered employee for added benefits, as agreed to in a Memorandum of Understanding between representatives of the carriers and their employees signed on December 10, 1971.

Other Cost Increases

Based on a relationship of the consumption of fuel, materials, and supplies in 1970 adjusted to the first half of 1971 freight traffic volume at the 1971 price index, respondents estimate that as of July 1, 1971, prices for those items increased over average price levels for 1970 at a rate equivalent to $134 million annually. By applying the January 1972 price index in a similar manner, increases occurring during the last half of 1971 were estimated to be $47 million, an amount which, when compared to the first half, represents a substantial decrease in the rate of inflation resulting in large measure from the price freeze in effect after August 14, 1971.

Also included in respondents' computations of increased 1971 expenses are the following amounts: $35 million for freight loss and damage, payments for personal injuries, insurance, and pensions; $7 million for depreciation and retirement charges; $1 million representing State and local taxes; $74 million for equipment rents; and $10 million for fixed and contingent charges. These amounts were computed on a calendar year basis with adjustments being made for the leveling-off effect of the August 14 freeze.

The increased costs noted about are summarized and subdivided by major districts in the following table.

TABLE 1

Items of cost escalation class I railroads

Item	Annual costs in millions			
	United States (1)	Eastern district (2)	Southern district (3)	Western district (4)
1. Wage rates and prices—prior to Aug. 15, 1971:				
2. Excess cost of 1970 wage increases (in excess of the 7 percent for which costs were submitted XP 265 for employees other than shopcrafts)	$271	$109	$42	$120
3. Wage increases, Apr. 1, 1971 (including Jan. 1, 1971 increases for shopcrafts and signalmen)	253	102	39	112
4. Increase in material prices, July 1971 over 1970 average	134	48	25	61
5. Subtotal (lines 2+3+4)	658	259	106	293
6. Wage rates, wage supplements, and prices—after Aug. 15, 1971:				
7. Wage increases, Oct. 1, 1971	305	123	47	135
8. Wage increases, Apr. 1, 1972	320	129	50	141
9. Payroll tax increase, Jan. 1, 1972	63	26	10	27
10. Health and welfare, increase in contribution, Mar. 1, 1972	99	41	15	43
11. Increase in materials prices, January 1972 over July 1971	47	23	8	16
12. Subtotal (lines 7 to 11)	834	342	130	362
13. Other increases since XP 265-267 (calendar year basis):				
14. Loss and damage, personal injuries, insurance, and pensions	35	33	(2)	4
15. Depreciation and retirement charges	7	(3)	8	2
16. State and local taxes	(1)	(6)	4	1
17. Equipment rents	74	38	17	19
18. Fixed and contingent charges	10	(3)	5	8
19. Subtotal (lines 14 to 18)	125	59	32	34
20. Total (lines 5+12+19)	1,617	660	268	689

Our review and analysis of respondents' underlying worksheets indicates the above data to be accurate and reliable with the exception noted immediately below.

In developing the cost of wage increases, respondents based such increases on the level of employment for the year 1970 reduced by 3.14 percent to reflect the first half of 1971 employment level. They should also have recognized that the 3.14-percent change in employment levels would result in a corresponding reduction in total labor costs as compared to the actual 1970 expenses. Those expenses totaled $4,620 million. Therefore, the 3.14-percent reduction would amount to $145 million.

In addition respondents should have reduced the $320-million wage increase effective in April of this year to $310 million to reflect a similar decrease in employment for the current year. The development of annualized cost increases of $63 million for payroll taxes and $99 million for health benefits have also been overstated by $2 million and $3 million, respectively, because of respondents' failure to recognize a decrease in employment for the current year.

These adjustments, in sum $160 million, reduce the total amount of cost increases in the table above to $1,457 million nationwide and to $594 million in eastern district, $244 million in southern district, and $619 million in western district; and, so adjusted, we find that they correctly depict the total annualized increases in costs faced by the Nation's railroads since closing of the record in the prior case.

REVENUE YIELD

Estimates of additional revenues to be obtained from the surcharge and the supplanting selective increases were computed in the same manner as in the prior case. Accordingly, they are based upon revenue ton-miles experienced by the carriers during the first 6 months of 1971 projected to reflect the entire year and multiplied by the average revenue received during the second and third quarters of 1971 at the X-267-B level. The resulting total revenue estimate for 1971 is then multiplied separately by factors of 2.5 and 4 percent representing, respectively, the surcharge increase and the average increase under the selective increase tariff to show amounts of revenue yield assuming both proposals were fully applied.[4] This "theoretical" return is reduced by the 82-percent effectiveness factor utilized in the prior report to reflect probable actual yield in

[4]The surcharge increase on lumber and lumber articles is subject to a 2 cents per hundredweight maximum which reduces its revenue yield by an estimated $8 million, or by $1 million in eastern, less than $0.2 million in southern, and $7 million in western district.

light of experience in application of previously authorized general increases. Respondents' calculations, nationwide and by major districts, are set forth in the following table:

TABLE 2

Railroads development of estimated revenue yield

Item	United States	Eastern district	Southern district	Western district
1. Revenue ton-miles, Jan.-June 1971 (millions)	382,871	124,856	71,611	186,404
2. Percent first half of annual ton-miles (based on experience in most recent 4 years	50.0	50.6	50.6	49.4
3. Estimated annual ton-miles (millions) (line 1 + line 2)	765,000	247,000	141,000	377,000
4. Average revenue per ton-mile, 2d and 3d quarters (X-267-B level)---(cents)	1.597	1.825	1.466	1.503
5. Annual freight revenues (millions) (line 3 x line 4)	$12,241	$4,508	$2,067	$5,666
6. Yield of full surcharge (2.5 percent x line 5, less lumber adjustment)	$299	$112	$52	$135
7. Average percent of selective increases	4.0	4.1	3.5	4.1
8. Yield full selective increases (line 7 x line 5)	$489	$185	$72	$232
9. Adjusted yield surcharge (line 6 x 0.82)	$246	$92	$43	$111
10. Adjusted yield of selected ubcreases (line 8 x 0.82)	$401	$152	$59	$190

These forecasts, in our opinion, are adequately supported and reasonably reliable, having in mind that estimates of the type involved, at best, are pragmatic and subject to many unforeseen contingencies.

While the past experience upon which use of the 82-percent reduction factor was predicated in the prior case may not recur as to the surcharge because of tis relatively low level and generally uniform application, we believe use of that factor results in a reasonable approximation of the revenue actually derived from the surcharge for another reason. In this respect, we note that the surcharge will have been in effect much less than a full 12-month period and was made inapplicable to recyclable materials after July 16, 1972, by virtue of a court order.[5]

Also, we have accepted the 82-percent adjustment applied to the selective increase proposal since any presumption that, due to its "selectiveness," experience thereunder will differ materially from

[5]See discussion under the caption "Environmental considerations," infra.

prior single-level general increases is dissipated by virtue of the fact that wholesale exceptions and flagouts by individual lines have already occurred and are continuing, a circumstance which will be commented on in a subsequent section of this report.

Accordingly, we find that the surcharge will yield appreciably less than $246 million during the limited period of its applicability and that the selective increases, *assuming* complete approval, would return $401 million as a maximum amount. The latter amount represents approximately 28 percent of the $1,457 million in increased cost levels found to have occurred since the record was closed in the prior case. The following table depicts this summary and contains a similar breakdown by major districts:

TABLE 3

Annualized	United States	Eastern district	Southern district	Western district
		(*millions*)		
Yield of surcharge	$246	$92	$43	$111
Yield of selective increases	401	152	59	190
Total cost escalations	1,457	594	244	619

We emphasize, however, that the actual revenue obtained from the selective increase tariff will be significantly less than the maxima indicated above due to anticipated further voluntary flagouts by individual lines, to delay in implementing corresponding intrastate increases, and to an overall limitation and specific exceptions and holddowns which we have found necessary to impose in order adequately to protect the public interest and preserve a lawful rate structure.

FINANCIAL CONDITION

Are the railroads in a position to absorb an even greater portion of their increased costs? In our judgment, based on the following analysis, a requirement that they do so would impair their already weakened financial structure and jeopardize their ability to provide essential services.

Composite financial data for all class I railroads and by major districts is contained in appendix A. In assessing their overall

condition, we shall focus upon six areas: working capital and maturing debt; equipment obligations; interest charges and equipment rents; capital expenditures and cash flow; net earnings and rate of return; and margin of earnings.

1. *Working capital and maturing debt.*—Net working capital of class I railroads, excluding the effect of long-term debt due within 1 year, amounted to $15 million on December 31, 1971, as compared with $109 million at year's end 1970, and $636 million on December 31, 1965. As reflected in the following territorial statistics, the eastern roads had a working capital deficit of $104.5 million.

	Net working capital	Long-term debt due within 1 year
Eastern district	($104.5)	$219.1
Southern district	90.7	162.3
Western district	28.9	249.4

If long-term debt due within 1 year were included in the railroads' current liabilities, as is the case outside the surface transportation industry, all three districts would show large working capital deficits. In our opinion, the foregoing statistics reflect a situation which cannot be lightly regarded in terms of the railroads' overall liquidity position and capacity to maintain orderly operations. See table 1, appendix A. It should be recognized, however, that we are dealing with totals and to infer from these statistics that all or even a majority of railroads have working capital deficits or lack sufficient working capital would be highly improper and unfounded. For example, the eastern district deficit was produced primarily by four roads, Erie Lackawanna, Pennsylvania-Reading-Seashore, Reading and Penn Central who had working capital deficits of $23.7 million, $8.5 million, $7.6 million and $53.7 million, respectively, as of December 31, 1971. Those amounts account for approximately 89 percent of the $104-million working capital deficit in the eastern district.

2. *Equipment obligations.*—The data contained in table 2, appendix A shows an almost two-fold increase in equipment obligations outstanding over a 10-year period 1960 through 1970 and marks a substantial effort of class I railroads in all districts to acquire badly needed rolling stock under difficult financial conditions. At year's end 1960, total equipment obligations

outstanding were $2.69 billion. At year's end 1970, by comparison, obligations outstanding aggregated about $4.4 billion. During that period, interest rates on these obligations nearly doubled,evidencing unfavorable market conditions. In 1960, interest rates on equipment obligations issued that year were about 4.6 percent while, in 1970, the comparable average interest rate approached 8.8 percent.

3. *Interest charges and equipment rents.*—The combination of greater debt and high interest rates has caused interest charges of class I railroads to increase from $398 million in 1966 to $561 million in 1971. In addition, net rents paid by the railroads for use of equipment owned by others increased even more. Combined, these charges increased from $891 million in 1966 to $1,377 million in 1971. Table 3, appendix A. Considered together with other indicia of respondents' financial condition, these increases have placed great strain on the railroad industry.

4. *Capital expenditures and cash flow.*—For many years, the railroads' capital needs for replacement and modernization of facilities have been far greater than their ability to acquire new capital either from internal or external sources. This has been a principal, but not the sole[6] factor behind the decline in capital expenditures shown in table 4, appendix A, with respect to eastern and western districts. In 1966, for example, industrywide expenditures totaled almost $2.0 billion, a decrease of about $800 million. In every year since 1962, the capital expenditures of class I roads have exceeded cash flow from operations by considerable amounts. Unable to finance their expenditures through internally generated funds, the railroads have had to rely principally upon borrowing to meet their capital needs. Under these circumstances, however, the railroads' ability to incur additional debt is severely limited without a substantial improvement in earnings. Without adequate capital to purchase new equipment deficiencies in service to shippers will be unavoidable.

5. *Net earnings and rate of return.*—Data contained in table 5, appendix A shows that net railway operating income of class I railroads increased from a critically low level of $486 million in 1970 to $698 million in 1971, an improvement attributable principally to the rate increases authorized in the prior case. Notwithstanding this marked improvement, 1971 earnings remained far below the $1,046 million in net railway operating income earned in 1966.

[6]Other influential factors have been increased reliance upon leasing equipment and the takeover of passenger service by Amtrak.

Despite the beneficial effects of the 1971 rate increases, the class I railroads' return on net worth remains very low in comparison with rates earned by other industries. For example, in 1970, the class I railroads' rate of return on net worth of 1.3 percent ranked 69th, or next to last, among all industries listed in annual rate of return statistics published by the First National City Bank of New York.

In light of these statistics, respondents contend that without the increases sought in this proceeding, their net earnings and rate of return would again plummet as a result of a continuing escalation of costs. Whether that result would necessarily follow is at best uncertain at this point in time but, it is clear that the income derived from the surcharge hardly scratches the surface in terms of developing a level of railroad profitability that will permit the kind of return on capital enjoyed in other sectors of the economy.

The exact effect of the selective increases in the present environment is difficult to ascertain. In this connection, we are referring to the general economic climate that will prevail during 1972; the labor demands during the year; the Government's decisions regarding fiscal and monetary policy; price-wage control policies; and last, but certainly not least, what the railroads will do to improve their overall situation.

However, based on our restated expense increases, it can be reasonably assumed that increases averaging 4 percent would have a very nominal effect. In this respect, we note that $401 million is the maximum additional revenue which respondents could expect if the selective increases were approved in full. This represents 3.8 percent of their annual revenue based on January through June 1971 revenue adjusted to the Ex Parte No. 267-B level. The estimated impact of this increase on their rate of return, considering increases in wage and fringe benefit costs up to April 1, 1972, and all other costs through the end of 1971, would be as follows:

	United States	District		
		Eastern	Southern	Western
	Percent	*Percent*	*Percent*	*Percent*
Without increase				
Return on net investment	(1)	(2.8)	1.6	2.0
Return on equity	.1	(5.4)	2.7	3.1
With increase				
Return on net investment	1.1	(1.8)	2.4	3.1
Return on equity	1.9	(3.4)	4.0	4.9

[1]Less than 0.1 percent.

It should be noted that even with the sought additional revenu respondents' rate of return on net investment, both nationwide an by major districts, will be less than in 1971. See table 5 of append A.

By comparison, revenue needs based on 6- and 8-percent rates o return on net investment[7] would be as follows:

Return	Percentage rate increase	Additional revenue
Percent	*Percent*	*Millions*
6	15.8	$1,550
8	24.1	2,366

Although a 15.8-percent increase would be required to produc an overall return in the United States of 6 percent, this would no provide sufficient revenue for the eastern district and would provid a return in excess of 6 percent for the southern and wester districts. To provide a 6-percent return on net investment b districts, the following freight rate percentage increases would b needed.

	Percent
United States	15
Eastern district	25
Southern district	10
Western district	10

The revenue needs based on 8-, 10-, and 12-percent rates of retur on shareholders' equity are as follows:

Return	Percentage rate increase	Additional revenue
Percent	*Percent*	*Millions*
8	18.6	$1,833
10	23.5	2,313
12	28.4	2,793

[7]Equally applicable here is our statement in the prior case: "* * * Our use of these rates f return in this discussion is not to be taken as an indication that rates of return of 6 percent on ne investment or 8 percent on net worth represent the maxima under present conditions, but rathe that they represent the rates of return which the respondents must make every effort to attain if they are to be in a position to provide the improved services which will be needed in the future" (339 I.C.C. 125, 182).

While an 18.6-percent increase would produce an overall return of 8 percent on shareholders' equity in the United States, the return would again be lower in the eastern district and higher in the southern and western districts.

To provide a return of 8 percent on shareholders' equity by districts, the following freight rate percentage increases would be needed:

	Percent
United States	18.6
Eastern district	27.0
Southern district	14.6
Western district	13.2

This again illustrates the magnitude of the revenue requirements for the eastern district compared to the southern and western districts, which are approximately 24 and 59 percent, respectively, of the eastern and western district needs.[8]

Equity yield to return on net investment.—A comparison of the return on shareholders' equity would produce the following returns on net investment of railroads in the United States.

Percent return on equity	Produces return on investment	Additional revenue requirements
Percent	*Percent*	*Millions*
8	6.7	$1,833.4
10	7.9	2,313.2
12	9.0	2,793.0

6. *Margin of earnings.*—As reflected in table 6, appendix A, the percent of revenues carried down to net operating income after

[8]In developing the amount of additional revenue required to earn selected rates of return on net investment and shareholders' equity, we have recognized effective Federal income tax rates of 24 percent in eastern district, 40 percent in southern district, and 33 percent in western district; and we have used the 82-percent factor to determine the actual yield that can be expected. The net investment base was derived from I.C.C. Annual Report Form A, excluding balances of accounts 80 ("Other elements of investment") and 90 ("Construction work in progress"). The effect of the exclusion is very small and has no significant effect. Compare, *Increased Freight Rates, 1968*, 332 I.C.C. 590, 604-605. We have not recognized savings generated by Amtrak which would aggregate to about 2.5 percent or less than $20 million. From a logical viewpoint, Amtrak should have very little effect, if any, on any freight expenses. Under the agreement signed by the participating railroads the railroads will be reimbursed for their solely related passenger expenses plus 5 percent or they can be reimbursed on a supported avoidable cost basis.

fixed charges has fallen from 5.5 percent in 1966 to 0.5 percent in 1971. This table, in our opinion, further illustrates the manner in which rising costs have outpaced revenues in recent years. During 1971, for example, class I railroads, combined, had a net operating income of only $65.8 million after fixed charges and before dividend payments, up from a deficit of $133.5 million in 1970.

Other considerations.—In light of the above analysis, we find no merit in the views of certain protestants who argue, in effect, that respondents should be required in this proceeding to absorb all cost increases. Our restatement of total cost increases which have occurred subsequent to our decision in the prior case recognizes an increase in productivity by reducing the related wage cost items by 3.14 percent to reflect a continuous decline in the railroad employment levels; and those cost increases, aggregating $1,457 million, greatly exceed the maximum amount of additional revenue which respondents could possibly obtain even if the sought increases were approved in full. Of necessity, they will have to exert maximum effort to effect greater increases in productivity.

In this respect, considerable progress has been made by the railroads. For example, gross ton-miles per employee hour paid have increased from 1,097 in 1966 to 1,234 for the year 1970. During the same period the average payroll cost per employee was increasing 30.4 percent from $7,734 to $10,085 and the payroll cost per 1,000 gross ton-miles was increasing 16.3 percent from $2.89 to $3.36. Those increases occurred while the total number of employees was decreasing 10.2 percent from 630,894 to 566,282 and gross ton-miles were showing only a 0.7 percent increase from 1,689 billion to 1,701 billion during the same period.

Various protestants also contend that the several "sick" lines in the East should not be used in constructing composite or average financial data for eastern district carriers or for railroads generally. Deficit lines, however, are part of an interrelated and interdependent railroad system; and in proceedings of this type we must consider the needs of the carriers as a whole or at least by major territorial groupings.[9] An attempt to assist individual railroads

[9]The paramount importance of a "system" approach was emphasized in 1970 when the continued operation of the Penn Central was in serious doubt. See House Report on Emergency Rail Services Act of 1970 (H.R. 91-1770), 1970 Cong. and Adm. News, p. 5985, *et seq.*, as follows:
"The efficient movement of freight by rail is dependent upon all parts of the system functioning as a unit. The malfunction of any part can disrupt the entire system. The Penn Central affords a prime example of the interdependency of the system. It interchanges with 164 railroads at 1,088 points. Many west coast products move to eastern distribution or processing centers served exclusively by the Penn Central.
(footnote continued on next page)

in financial distress by authorizing them to take higher increases than those permitted more fortunate lines competing in the same territory would be self-defeating. The "favored" carriers would have a Hobson's choice of either foregoing the higher increases or losing traffic to competitors with lower rates.

But apart from that practical problem, any implication that, absent data from deficit lines, the sought increases will be excessive for railroads generally or for the majority of carriers operating in the eastern district is misplaced. The average rates of return of those other carriers would rise slightly but would nevertheless remain at a depressed level when compared with return rates enjoyed in many other industries.

The following table illustrates how exclusion of the major deficit line (Penn Central) would effect the percentages and amounts of increase needed to achieve the rates of return indicated.

TABLE 4

Including Penn Central			Excluding Penn Central	
Rate of return	Percentage increase	Additional revenue	Percentage increase	Additional revenue
Percent		*Millions*		*Millions*
		Based on net investment—United States		
6	15.8	$1,556.0	13.3	$1,099.7
8	24.1	2,366.1	21.8	1,794.0
		Based on shareholders' equity—United States		
8	18.6	1,833.4	15.9	1,312.1
10	23.5	2,313.2	20.9	1,726.1
12	28.4	2,793.0	26.0	2,140.1
		Based on net investment—eastern district		
6	25.1	933.8	20.4	477.5
8	32.7	1,217.2	27.6	645.0
		Based on shareholders' equity—eastern district		
8	27.0	1,003.9	20.7	482.7
10	31.0	1,153.9	24.3	566.9
12	35.0	1,304.0	27.9	651.1

(footnote 9 continued)

. . . . . .

It is clear that the maintenance of a sound rail transportation system and a healthy national economy is dependent upon continued performance of essential rail service by all segments of the system."

Price stabilization.—In accordance with the Economic Stabilization Program and with rules and regulations promulgated thereunder by this Commission (pursuant to approval of the Price Commission) in Ex Parte No. 280, *Special Procedures for Tariff Filings Under the Wage and Price Stabilization Program*, by our order of July 13, 1972 (49 CFR 1311.0-1311.4), we find:

1. That the former or existing rate level is the Ex Parte No. 267-B rate level in effect prior to February 5, 1972. The proposed selective increases range from 0 percent to a maximum of 10 percent and will average 4 percent. The selective proposal is in lieu of and not in addition to the 2.5-percent surcharge increase which became effective February 5, 1972;

2. That the maximum dollar amount of increased revenue the proposal would provide (if fully applied and absent limitations and holddowns later required herein) is $401 million, allocated as follows: $152 million—eastern district, $59 million—southern district, and $190 million—western district;

3. That the above additional revenue is less than the amount of cost increases actually experienced by the carriers during 1971 and, therefore, no increase in railroad net operating income as a percentage of total operating revenue is expected;

4. That no increase in the railroads' overall rate of return on capital is expected for the reason stated in (3) above;

5. That the increase proposal is cost justified and does not reflect future inflationary expectations. In this respect, we further find that cost increases resulting from negotiated contracts for wages and fringe benefits are not "anticipated or speculative." Rather, they are firm cost increases that the industry will have to pay;

6. That the additional revenue to be derived from the increase proposal can be considered at best only a partial fulfillment of the railroads' revenue requirements, and in that sense will return a minimum amount required to assure continued, adequate, and safe service or to provide for necessary expansion to meet future requirements for transportation services;

7. That within the context stated in (6) above, the increase proposal will achieve the minimum rate of return needed to attract capital at reasonable costs and not impair the credit of the railroads;

8. That the labor costs upon which the proponents rely fall into two categories. Wage contracts affecting approximately 94 percent of railroad employees represented by unions, calling for increases to become effective October 1, 1971, and April 1, 1972, were executed before November 8, 1971, and a pass through of the costs of those

increases is clearly permitted by Price Commission policies. (CCH Econ. Controls Rep. Par. 5345.20) The pattern of increases agreed upon by those contracts was established by a Federally constituted board--Emergency Board No. 178—and the first two steps in the staged increases which the board recommended were adopted by the Congress in legislation enacted December 10, 1970, to halt a work stoppage (P.L. 91-541). Under these circumstances, it is clear that the railroads had no real alternative to the execution of contracts, also following the pattern of Emergency Board No. 178's recommendations, with the Brotherhood of Rilroad Signalmen, on November 16, 1971, with the International Brotherhood of Firemen and Oilers, on February 11, 1972, and with the Sheet Metal Workers Int'l. Ass'n., on May 13, 1972. Thus, even though these contracts were executed after November 8, 1971, we conclude that to require the carriers to absorb the costs of the wage increases which they represent, to the extent that such increases exceed 5.5 percent per year, would be grossly inequitable, and that the full costs of such increases should be taken into account in considering the carriers' costs of operation.

9. That the increase in productivity required to close the gap between the maximum revenue obtainable by the railroads under the freight rate increases considered herein and the cost increases experienced by them will exceed by far the 6.3-percent guideline for the railroad industry suggested by the Price Commission in rules issued on May 3, 1972.

Future evidential requirements.—Looking beyond the exigencies of this proceeding, respondents are advised and forewarned that our acceptance of annualized costs and other data of a type submitted in this and in prior general revenue proceedings is not an irrevocable commitment; and that, in the future, we will require a much more variable data base to support an application for revenue relief. To this end, we intend promptly to institute a rulemaking proceeding looking toward prescription of minimum evidentiary requirements in railroad general increase cases to supplement the regulations in 49 CFR 1102. We realize, however, that the process leading to an ultimate determination of such requirements will consume considerable time, based on our experience in Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*, 339 I.C.C. 324, and 340 I.C.C. 1.

Accordingly, as an interim measure, we have determined to indicate the evidentiary showing which should be made in any rail revenue proceeding which might be instuted prior to the

promulgation of specific procedures. Provisions relevant to such an evidentiary showing are set forth in appendix B and will be referred to as "interim procedures." They include the provisions regarding application, service, and verification previously promulgated in our procedural order of August 13, 1970, *supra*. We wish to make it clear, however, that respondents are not precluded from submitting additional evidence to support their proposals.

Summary.—We conclude that the Nation's railroads as a whole and by major districts have a serious and immediate need for additional revenue; and that their ability to meet current expenses and to provide the capital for improvements in equipment, facilities, and services requires prompt revenue relief; and that the public interest and that of the national defense in a sound, adequate, and efficient transportation system will be adversely affected unless such increased interstate freight rates and charges as are hereinafter authorized are permitted to become effective promptly. Conversely, we find that without that additional revenue, the earnings of respondents will be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.

Environmental Considerations

Before discussing in detail the specific tariff proposals by which respondents have sought to meet their revenue needs, we shall first consider the freight rate increase proposals before us in their overall aspect in light of the policy expressed in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*

Background.—In our prior report in this proceeding, entered December 21, 1971, we noted that the carriers had failed to submit a statement with their petitions regarding the environmental impact of their proposal. The petitioners were instructed to file and serve an environmental impact statement within 10 days from the date of service of those orders, and the railroads filed their statement on January 3, 1972. The above-mentioned report and accompanying orders were served on all parties to the prior case,[10] and on all

[10]Service on the parties to these earlier freight rate increases included service on a group styling themselves as Students Challenging Regulatory Agency Procedures (S.C.R.A.P.). That group's principal argument, before this Commission as well as in the U.S. District Court for the District of Columbia (civil action No. 971-72, *Students Challenging Regulatory Agency Procedures (S.C.R.A.P.) and Council on Environmental Quality* v. *United States of America and the Interstate* (footnote continued on next page)

known consumer and environmental interests. In addition, the orders were published in the Federal Register. As a consequence, all persons interested in the environmental issues received due notice of our intention to consider such issues and have been accorded an opportunity to participate in this proceeding. Inasmuch as we conclude that our actions herein will neither actually nor potentially significantly affect the quality of the human environment, we have not included in our report an extensive formal impact statement. Notwithstanding, our findings respecting commodities being transported for purposes of recycling permit interested parties to file comments before the increases become effective.

By our order dated February 1, 1972, we found that approval of the request by the Nation's railroads to impose a 2.5-percent emergency surcharge on all freight shipments beginning February 5, 1972,[11] would have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment within the meaning of the NEPA. In approving this temporary increase (then conditioned to expire on June 5, 1972), we further noted, among other things, that the railroads have a critical need for additional revenue to offset, in part, recently incurred increases in their operating costs.

By order dated March 1, 1972, and served March 6, 1972, a draft environmental impact statement (a copy of which is attached to this report as appendix C), was served on all parties to this proceeding and on other governmental agencies (including the Council on Environmental Quality, Environmental Protection Agency, and the Office of Environmental and Urban Systems, Department of Transportation), which might have an interest in that matter. By its decision of July 10, 1972, in *S.C.R.A.P.* v. *United States*, civil action No. 971-72 (D.D.C.) the United States District Court for the District of Columbia enjoined the collection of the 2.5-percent interim surcharge on goods being transported for purposes of recycling after July 15, 1972, because it found that this Commission had failed to give adequate consideration to environmental amenities in

(footnote 10 continued)
Commerce Commission, referred to later in this report), was that those two rate increases had violated the terms of NEPA and were therefore invalid. S.C.R.A.P. also argues that this Commission should order a refund of moneys paid under these invalid rates, and "suspend consideration of any additional or further requests for freight rate increases by the nation's railroads, pending a hearing" on S.C.R.A.P.'s contention.

[11]We had earlier denied, by order entered January 7, 1972, a petition filed December 20, 1971, by S.C.R.A.P. seeking a 2-week extension of time beyond January 20, 1972, for filing protests against the proposed surcharge and an additional 2-week extension of the date (February 5, 1972) on which such surcharge was to become effective.

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the draft impact statement.[12] That statement was issued to emphasize certain of the environmental matters at issue in this proceeding and in full recognition of the fact that the involved statement did not comply with all of the requisites of an environmental impact statement as defined by the NEPA. Not only was that statement issued prior to the completion of this Commission's study of our responsibilities pursuant to the NEPA and prior to our final adoption of regulations implementing the NEPA *(Implementation—Natl. Environmental Policy Act, 1969,* 340 I.C.C. 431 (1972)), but it expressly contained the caveat that the opinions and conclusions there set forth were tentative and based only on the evidence then available. It was explicitly recognized that more evidence would be needed before the environmental impact of this matter, including the selective increase proposal filed February 28, 1972, could be definitively measured. We trust that the statement and findings contained in this report fully comply with our environmental duties imposed by the Congress and with the regulations, which became effective March 28, 1972, adopted in the above-mentioned proceeding. While we agree with the view expressed by a number of courts, including that in the *S.C.R.A.P.* case, *supra,* that the Congress plainly did not intend NEPA to be a paper tiger, it must be realized that the Congress at the same time failed to appropriate any additional funds with which this Commission might meet these added duties at the highest level of compliance that might be theorized. What the court characterizes as a "wholesale abandonment" of the impact statement procedure represents an earnest attempt by this Commission to comply with the statutory requirements of NEPA "to the fullest extent possible" while bearing the burden of the obligation without appropriation.

Representations.—Environmental comments in the form of initial and reply verified statements have been filed by divergent interests, pursuant to the procedure prescribed in our orders of December 22, 1971, and March 6, 1972, concerning (1) the surcharge which became effective on February 5, 1972, and (2) the selective increases proposed by the railroads. Each of the parties submitting representations has expressed the opinion that its interest must be protected for the overall good. A summary of the environmental

[12] On July 19, 1972, in *Aberdeen R. Co.* v. *S.C.R.A.P.*, No. A-73 (Sup. Ct., Oct. Term) Chief Justice Burger, acting as Circuit Justice for the District of Columbia Circuit, denied this Commission's application for a stay of the district court's judgment pending appeal. He concluded that, on balance, the district court did not abuse its discretion in deciding "that there was danger to the environment outweighing the loss of income and consequent financial threat to the railroads."

issues raised and the facts of record in this proceeding as they bear upon those issues is contained in appendix D.

Environmental discussion and conclusions.—Each of the participants in this proceeding has had full advantage of an opportunity to express their views as to the impact that the temporary surcharge and the selective freight rate increases here under consideration may have upon the quality of our human environment. The presentations submitted by these parties have been helpful, and we believe that the vital public interest in a clean and healthful environment ultimately will be furthered by the arguments they have advanced. This is so even though many of the comments and representations are plainly advanced in furtherance of those parties' own particular or special interests. For example, the submitting railroads contend that they should not be required to finance industrial ecological programs through the maintenance of unduly low freight rates; the shipping interests request that their products not be subject to the proposed rate increases or that those products should be subject to certain holddowns; the environmentalists maintain that rates on secondary materials (which assertedly should move in greater volumes for recycling purposes) ought to be preserved and protected (if not lowered) at all costs; and the governmental interests together with the private environmental sector seek to demonstrate that this Commission should investigate environmental matters and effects more extensively with our own resources. Be that as it may, it is deserving of mention at this point in our deliberations that our own independent study, conducted with the limited resources and within the time available to us, has failed to uncover any possible environmental effects of our present action other than those to which the parties have fully addressed themselves. As a consequence, it is these arguable environmental effects that necessarily comprise a major part of our evaluation of environment factors in this proceeding.

We recognize, however, that there is no absolute or mathematically conclusive method of balancing the environmental, economic, and social values involved in a proceeding of this type. Accordingly, in our attempt to analyze the probable results of any action we take in this proceeding upon the quality of our human environment, we have carefully examined the evidence of record, applied our expertise in surface transportation, and utilized to the fullest extent possible, given the limitations of time and budget, all available expertise in ecological, economical, and social areas.

As Chief Justice Burger stated in *Aberdeen R. Co.* v. *S.C.R.A.P., supra:*

Our society and its governmental instrumentalities having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulation. The decisional process *** is one of balancing and it is often a most difficult task.

We trust that any court that may be called upon to review this environmental discussion will accord appropriate weight to economic and social considerations in addition to that which might be given environmental matters. Certainly one important area of human life should not be permitted to operate to the detriment of all others. It is our responsibility, as well as that of the courts, to balance fully the costs and benefits of our actions.

It is the purpose of the NEPA to have Federal agencies such as this Commission, in cooperation with State and local governments and other public and private organizations, use all practicable means and measures to create and maintain conditions under which man and nature can exist in productive harmony. To this end, section 102 of the NEPA specifically requires that, to the fullest extent possible, we shall—

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality ***, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should this proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes; ***.

The NEPA section 102 impact statement is intended as a device to assure that Federal agencies investigate and give weight to any significant environmental effects caused by action which they take, to require the development of less damaging alternatives, and to assure that those effects are made known to the public before the action is undertaken. The guidelines of the Council on Environmental Quality, reproduced in appendix A to our report in *Implementation—Natl. Environmental Policy Act, 1969, supra*, seek to coordinate the efforts of Government agencies and to allow Federal agencies to assess in detail the potential environmental impact of a considered course of action in order that adverse effects may be avoided, and environmental quality restored or enhanced, to the fullest extent practicable.

Preliminary to an evaluation of the present record in the light of environmental considerations, we must discuss the extent of our responsibilities in this proceeding to develop and present evidence as to the environmental consequences of the temporary surcharge and the supplanting selective freight rate increases requested by the railroads. Certain parties to this proceeding have taken the position that this Commission should itself supply *all* the data necessary for the fullest evaluation of the environmental effects of a considered action.[13] This Commission is a quasi-judicial agency which constantly seeks, within the bounds of our budgetary and personnel resources and our transportation expertise, to develop fully the record in each proceeding before us.[14] Cf. *Calvert Cliffs'*

[12] By letter of March 16, 1972, the Environmental Defense Fund requested permission to cross-examine certain railroad witnesses, as well as those Commission personnel preparing the draft environmental impact statement issued in the proceeding, at the hearings which were scheduled to commence on March 23, 1972. At the hearings, EDF withdrew its request to cross-examine the railroad witnesses, but again formally asked to cross-examine the individuals within the Commission that were responsible for the preparation of the Commission's draft impact statement. This request was denied by the hearing officer. We affirm that ruling. To the extent that draft environmental impact statements, such as the one issued in this proceeding, contain data and analyses, the actual sources of that information are either identified in the statement itself or are readily apparent from its subject matter. In the instant proceeding, the factors and discussion embraced in the draft statement were developed from the arguments and contentions of the parties that earlier were presented in Ex Parte Nos. 265 and 267. As a consequence, no useful purpose would be served through the requested cross-examination which is hereby denied.

[13] It should be mentioned that because of our concern with the reuse and depletion of our land and natural resources, we have recently promulgated regulations (49 CFR 1062.1), Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92 (1971), which permit motor carriers to receive special authority from this Commission to operate in interstate commerce upon a showing that they will transport "waste" products for reuse or recycling in furtherance of a recognized pollution control program. It is our hope that the adoption of these regulations will encourage all motor carriers to join in the national effort to save and restore our American environment.

Coordinating Committee v. *U.S. Atomic Energy Comm.*, 449 F. 2d 1109 (1971). The severe limitations on both our funds and personnel, of which the Congress and the public are fully aware, as well as the nature of the subject matter preclude the conduct of our own empirical research and the direct gathering by us of environmental data to any significant degree. We have here attempted, however, to utilize all *practicable* means and measures to evaluate environmental considerations to the fullest extent possible. We do not believe that the Congress intended for us to go beyond the "practicable" when it enacted NEPA. (See 42 U.S.C. 4331.) We must, as a consequence, depend in substantial part on the parties to a proceeding, at our direction, to furnish all needed information, and shall continue to direct those parties to supply that information necessary to allow us properly to evaluate environmental issues coming within our jurisdiction.

We have, in this light, reviewed the record compiled in this proceeding and we do not find wanting—given the current, admittedly underdeveloped state of proficiency and expertise that might be brought to bear on this matter—the evidence that is or would reasonably be determinative of the environmental issues embraced in the present proceeding.

The basic questions to be explored in this proceeding[15] are (1) whether increased rail freight rates will divert traffic from the railroads to other modes of transportation in degradation of our human environment, and (2) whether the proposed increased rail rates will adversely affect the movements (and hence, it is argued the recycling) of secondary materials. These are the essential environmental questions presented by the parties, including the Council on Environmental Quality, and their full consideration here will, in our judgment, entirely satisfy our duty under the NEPA to develop the full range of impacts of the surcharge and proposed selective rate increases.

Neither of these fundamental questions can be answered, we believe, without some reasoned consideration of how the responsibility for protecting the environment should be apportioned

[15]The decision of the court in *S.C.R.A.P.* v. *United States*, *supra*, has, for all practical purposes, rendered consideration of the environmental impact of the 2.5-percent surcharge moot. As noted above, the court stayed the effectiveness of the surcharge and concluded that the damage done to the environment is likely to be irreparable and cannot be undone by subsequent rebates to shippers since once raw materials are extracted from the ground and used, they cannot be returned from whence they came. It should be noted, however, that our findings with respect to the selective increases apply with virtually equal force to the impact of the surcharge upon the environment.

among the larger segments of our society. The rail carriers contend in this connection that the industry creating the waste in the first instance should bear the complete responsibility for disposing of such waste. On the other hand, industrial concerns and other shippers aver that they are fulfilling their environmental responsibilities by conducting environmental research, and that the railroads should bear the burden of transportation costs so that funds are not diverted from industry environmental research. These interests both contend that they are deeply concerned with the environment, but each would prefer to leave any sacrifices for ecological protection to its counterpart. In fact, however, environmental improvement is a national goal and all segments of our Nation—including industry, the railroads, governmental organizations, and private citizens—must cooperate to achieve that end.

We are of the opinion that the creator of waste properly should be called upon to bear a major responsibility for disposing of that waste in an ecologically sound manner. Of course, other segments of our economy must not construct unnecessary or undesirable barriers to the economic disposal of such commodities. The railroads have transported waste and scrap products at just and reasonable rates for many years—indeed, before environmental aims became fashionable—and the increases approved in this proceeding will not, in our judgment, alter that pattern.[16] The evidence here of record, as well as our analysis of such evidence in the light of all available source material, convincingly establishes that, despite the increases on secondary materials authorized in this report, they will continue to move by rail with the same or greater frequency as before. It is further established that, without those increases, the railroads would not be able economically and efficiently to provide the shipping public with the service it requires. If this were allowed, the Nation would be faced with an economic as well as an environmental crisis. For, if the railroads cannot properly finance their operations, their services and operations will deteriorate and either the traffic will then be diverted to other modes of transportation or it will not be transported at all.

The rails must move commodities at just and reasonable rates and should attempt, wherever practicable, to promote the transportation of secondary materials. To direct them to do more is to require the

[16]It should be noted at this point that this view is the result of our consideration of the present and future economic and environmental effects of the proposed action and not merely the incremental change in the situation since the last rail freight rate increases were permitted

rail carriers to bear the environmental burdens of their customers. Most, if not all, of these carriers are not financially capable of assuming those burdens; and an effort to shift the economic costto shippers of other commodities in the form of increased rates or charges might well result in discrimination or prejudice proscrited by section 2 or 3(1) of the act. In any event, it is this Commission's statutory responsibility to prevent the railroads from pursuing any course of action which might jeopardize their total ability and dity to serve.

It is said that our approval of all or part of the railroad's proposals selectively will tend to divert traffic to truck transportation and thereby further to despoil the environment. We deem the syllogism to be simplistic and speculative, and we decline to accept its mere assertion as a basis for our decision.

It is true that the trend of traffic has been away from the railroads. During 1971, the class I line-haul railroads (railroads with annual operating revenues of $5 million or more) carried 5.9 percent fever tons of revenue freight than during 1970, a decline from 2,613.6 million tons to 2,458.6 million tons, and revenue ton-miles decreased 3.6 percent, from 762,544 million ton-miles to 739,.91 ton-miles. Transport Economics, March-April 1972, page 7. The trend is more pronounced and of longer duration in terms of the railroads' share of the transportation market. In 1970, the railroads handled less than 40 percent of the total intercity ton-miles of freight transported by all modes of carriage, public and private, a decline of 7 percent from the 43-percent share of the market that the railroads enjoyed 10 years earlier, in 1960 (85th Annual Report, 1971, page 119; 79th Annual Report, 1965, page 141). In contrist, during that same period the truckers retained their share or about22 percent of the transportation market, with an actual increase in the ton-miles transported by them from 285 billion to 412 billion, an increase of 45 percent. *Id.* We do not think these marked shifts in traffic patterns fairly can be attributed to only the railroads' pricing policies.

Truck transportation long has been recognized as offering certain inherent advantages over rail transportation. *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957). These have included the speed, flexibility, and smaller cargo units peculiar to that mode, and the developments of the past decades in these areas have further favored truck transportation over rail transportation as a mode of intercity carriage. Foremost as a factor improving the truckers' ability to effect rapid deliveries has been the completion of much of the Interstate Highway System and the greater speed that the

vehicles operating over it are able safely to maintain. Related has been the accelerated dispersal of industrial plants and commercial establishments into suburban and even rural areas, often removed from rail lines, further emphasizing the unique ability of trucks promptly to perform door-to-door service. Finally, the improvements in small containers and demountable truck bodies have emphasized the relative greater ease with which these can be dropped off to be loaded by shippers who do not ship in quantities sufficient to enable them to tender carloads of freight to the railroads.

At the same time railroad service to some extent has been deficient. In our report in *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 156 (1971), we noted several areas in which shipper complaints had been numerous and appreciable improvements were required, particularly, terminal delays, interchange delays, erratic delivery and deliveries not reasonably timed or spaced. Similarly, in our report in *Investigation of Adequacy of Freight Car Ownership,* 335 I.C.C. 264 (1969), sustained, *Allegheny-Ludlum Steel Corp.* v. *United States, et al.,* 325 F. Supp. 352 and *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972), we called attention to the increasingly unsatisfactory performance of the railroads both in terms of car supply and their utilization. Certainly shippers encountering poor service on the rails would be inclined to explore the alternatives offered by truck transportation.

In sum, the shippers' reliance upon rail service is a product of many factors, all of which combine to make up what the economists term the demand for rail service, and the shippers' ability or willingness to divert traffic to truck transportation is expressed in the elasticity of demand for such service. The elasticity of demand for rail service varies being considerably greater for some commodities than for others and being more pronounced for shorter distances than for longer. Thus, we note that long-haul rail transportation of livestock has all but disappeared and is now handled by truck. On the other hand, long-haul truck transportation of new automobiles has largely ended, having been recaptured by the rails. No all inclusive generalization is possible. See *Transportation of "Waste" Products for Reuse, supra.*

Grain and other agricultural commodities perhaps more than any other category of freight demonstrate the elasticity of damand for railroad service. In our Big John case of a few years ago, *Grain in Multiple-Car Shipments—River Crossings to So.,* 321 I.C.C. 582 (1963), we noted the increasing participation of trucks and barges in

grain movements to the South, a trend which has been no less pronounced in other parts of the country. Grain Transportation in the North Central Region, U.S. Department of Agriculture (1961). What makes such products particularly susceptible of diversion from the railroads is that their transportation by motor carriers or, when transported in bulk by water carriers, is exempt from regulation by us. There is freedom of entry into the business, and the setting of rates and charges is wholly within the discretion of the carriers soliciting the traffic. Aided by technological advances in the vehicles and vessels they utilize and continuing improvements of the highways and waterways upon which they operate, the truckers and bargelines transporting grain and other agricultural commodities have proved themselves to be forceful and effective competitors to the railroads, often offering better and cheaper service.

The response of the railroads, perhaps slow in coming, has been to cut their rates to meet the competition of the truckers and bargelines wherever and to whatever extent they can. Thus, as a practical matter, the exempt carriers for the past several years have set the rates for the movement of grain and other agricultural commodities. A study of the U.S. Department of Agriculture, The Economics of Farm Products Transportation, Marketing Research Report No. 843 (1969), confirms that, "[f]reight charges for traffic that is subject to active intermodal competition generally reflect the lowest rates at which truck or barge operations (singly or in combination) would be prepared to offer service." As that study explains:

> For-hire motor and barge operators, therefore, have generally taken the initiative in extending intermodal competition for farm products to more and more shippers in a widening range of locations. At any time, the outer geographic limit of service is set by truck or barge costs in relation to existing rail rates, and the extension of transportation alternatives to these limits brings pressure in turn on rail carriers who respond to the actual or proposed diversion of traffic by seeking—through regulatory channels—to reduce rates or improve service or both. The reduction typically brings rail rates about into line—on a service-equivalent basis—with the lowest rates at which competing carriers can offer service over the same or alternative routes. Once such an adjustment has taken place, the specific sequence of challenge and response initiated by intensified truck or truck-barge competition is concluded. [Footnote omitted.]

In such competitive context the threat of diversion as a result of our actions herein fails to comport to reality, for, bearing in mind that our order is permissive and not mandatory, it is unlikely that the railroads will avail themselves of the authority to increase the rates and charges except to the extent that the level of truck and barge-line rates would enable them to do so without losing the traffic.

No commodity of great importance to the railroads better reflects the interplay of the many and varied factors influencing its movement, only one being the level of railroad rates and charges, than does coal. We frequently have noted the intense competition that utility coal encounters from other energy sources and have allowed the railroads to innovate reduced rate proposals to stem the threat of diversion. See *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960); *Coal from Ky., Va., & W. Va. to Virginia*, 308 I.C.C. 99 (1959). The demand for low sulfur content fuels within recent years has introduced a further factor disrupting traditional patterns of coal movements by the railroads.

The movements of utility coal by the railroads are influenced very slightly if at all by our authorization of general rate increases. The commitments to use rail-transported coal are long range and virtually fixed and reflect a supplier's contract to deliver a certain quantity of coal of a specified quality over the life of the agreement, on the one hand, and, on the other, the utility's investment in a plant with burners and other facilities dedicated to the use of such coal. As to this and similar traffic, then, we believe the fears of diversion of tonnages from the railroads as a result of the actions we approve herein are without foundation, and we refuse to speculate that such will be their result.

The level of the rail rates in relation to the level of the charges by truck, of course, is a factor entering into the determination of the demand for rail service. But to suggest that we should not authorize increases in the rates and charges of the railroads, compelled by rising labor and other costs, because of the diversionary effect of such action, assumes that the pressures of escalating costs have not fallen as heavily upon the truckers and that the truckers have been able to avoid increasing thier rates and charges to the extent that the railroads have been forced to do. The facts as we know them support neither assumption.

An indicium of the rate increases that the truckers and the railroads have taken from 1960 to 1970 is the revenue per ton-mile that they have earned on their traffic. For the railroads the revenue per ton-mile rose from 1.403 cents in 1960 to 1.428 cents in 1970, an increase of about 2 percent. The revenue per ton-mile for class I motor common carriers rose from 6.310 cents to 7.458 cents, or about 12 percent. Transport Economics, January-February 1972. The truckers have sought virtually semiannual increases in their rates and charges, and even as this investigation was in progress we permitted the rate bureaus representing about 85 percent of the

regulated motor carriers of the Nation to publish increases ranging from 2 to 5 percent. These patterns scarcely suggest that the increases in railroad rates and charges have been the predominant cause of the diversion of traffic from the railroads to the trucks.

However, even if we were to assume, *arguendo*, that the increases in the railroads' rates and charges will tend to divert traffic to truck transportation, it does not thereby follow that the environment will be further despoiled. The data on the relative polluting effect of train and truck operations is fragmentary and inconclusive, at best.

We were obliged to consider the relative polluting effect of train and truck operations in Bush Terminal R. Co. Abandonment, review pending, civil action No. 71-C-1639, *City of New York* v. *United States* (E.D. N.Y.). In our report on further consideration in that proceeding, we concluded that the substitution of truck service for the railroad operations sought to be abandoned would not significantly increase the level of air pollution in the affected area. We relied, in part, upon data derived from Nationwide Inventory of Air Pollutant Emissions, 1968, Publication No. AP-73 of the National Air Pollution Control Administration, U.S. Department of Health, Education and Welfare (1970), which we found "shows that diesel trucks emit *less* carbon monoxide and nitrogen oxide per 1,000 gallons of fuel than diesel trains, with the amounts being similar in the other pollutant categories." We also heard testimony based upon a preliminary draft of Compilation of Air Pollutant Emission Factors, Office of Air Programs Publication No. AP-42, U.S. Environmental Protection Agency (1972), which study confirms that in some respects heavy-duty diesel trucks are not as offensive as locomotives, although it concludes, on the basis of unpublished data, that diesel trucks emit *more* carbon monoxide and nitrogen oxide per 1,000 gallons of fuel than diesel trains.

The lack of publicly available data on air polluting locomotive exhaust emissions was noted in A Study of the Environmental Impact of Projected Increases in Intercity Freight Traffic to Association of American Railroads, Battelle Columbus Laboratories (1971). That study proceeded on the assumption that locomotive diesel engine emission characteristics are not substantially different from those of truck diesels. However, based on an estimate that trucks require the expenditure of four times as much energy, on the average, as railroads in moving a gross vehicle ton-mile, the study concludes that on a per-ton-mile basis, railroad exhaust emissions are substantially lower than motor truck exhaust emissions. In other respects, particularly peak sound levels, the study states trains and

trucks are not dissimilar in the environmental impact of their operations.

An even more exaggerated claim of the relative greater efficiency of trains is contained in Commoner, The Closing Circle, 171 (1971). That study, without supportive data, asserts "[t]he energy required to move one ton of freight one mile by rail now averages about 624 btu (British thermal units), while trucks require about 3,460 btu per ton mile. This means that, *for the same freight haulage*, trucks burn nearly six times as much fuel as railroads—and emit about six times as much environmental pollution" [emphasis in the original].

Our conclusions as to the relative efficiencies of diesel-powered locomotive and diesel-powered trucks, the preponderant vehicles handling intercity freight, are more conservative than those of either of the foregoing studies. Relying upon the fuel consumption figures cited in the H.E.W. publication and our reported ton-mile data, we note that in 1968 the railroads transported 756,800 million ton-miles of intercity freight and consumed 3,810 million gallons of diesel fuel. That same year trucks handled 396,300 million ton-miles of intercity freight and consumed 5,350 million gallons of diesel fuel. Thus, we would calculate the relative greater ability of locomotives than trucks to transport ton-miles of freight per gallon of fuel consumed as being less than three to one.

The pitfalls of quantification are avoided in yet another study, Railroad and Railroad Freight Operatiors and the Environment, National Industrial Pollution Control Council (1972), which merely concludes that "[t]he rail mode—a highly efficient means of transporting goods and people—has the advantage of producing relatively low pollution per ton mile." Yet that report acknowledges that railroad diesel engines currently in use, no more than truck diesel engines, would be able to meet the gaseous emission standards proposed for adoption by the Environmental Protection Agency. It also observes that the sound levels for freight trains and trucks are similar.

In our attempt to assess whether rail or truck transportation is the greater polluter of the environment we have been handicapped by the insufficiency of available data. Measured in terms of ton-miles of freight handled per gallon of fuel consumed, locomotives seem to be the more efficient vehicles and hence lesser pollutants than trucks. However, supportive data are unavailable or, if available, unpublished, and accordingly the definitive testing of the conclusions and the effective calculation of the relative efficiencies of trains and trucks are not possible. Similarly, probative data are unavailable or

unpublished to permit a reliable comparison of the emission characteristics of locomotives and trucks, although it would appear that they are not markedly dissimilar. The absence of data may be corrected by studies undertaken by the Environmental Protection Agency or others, and we earnestly recommend that they be undertaken.

Several of the parties also contend that the sought rate increases, if approved, would merely aggravate basic longstanding discriminations against secondary materials which, assertedly, are embedded in the present rate structure; and they urge that we use this proceeding as a vehicle for resolving that issue. An in-depth investigation of the type suggested, however, is clearly impractical, indeed impossible, in the context of this proceeding where the principal issue is whether the Nation's railroads have an *immediate* need for overall revenue relief. The long delay in decision-making which necessarily would result from expanding the scope of our investigation in the manner requested would be tantamount to a denial of effective relief. In any event, we currently have under way a comprehensive investigation in Ex Parte No. 270, *Investigation of Railroad Freight Rate Structure*, 340 I.C.C. 868, a proceeding which was instituted by us in recognition of the growing concern regarding the pricing of railroad services. More particularly, we felt the need for exploring whether, as has been contended, the application by the railroads of the increases in rates and charges as approved by us, especially when measured as percentages of existing rates, have over the years caused a misalignment of rate relationships and a distortion of proper rate levels. A specific area we have assigned for development in that case is the way in which our prior rate decisions may have had an effect on the Government's program of protecting the environment. The Institute of Scrap Iron & Steel, Inc., the National Association of Secondary Material Industries, Inc., and other parties to this proceeding are parties as well to Ex Parte No. 270.

In our subsequent analysis of economic and regulatory aspects of increases proposed within particular commodity groups, we have given careful consideration to environmental factors. Based on that analysis, we are persuaded that prior recent general increases in railroad freight rates and charges have not substantially affected the use, consumption, or shipping of secondary materials, and that increases at the levels authorized herein will have no significant adverse impact on the quality of our human environment. Rather, we believe that a likely result of the overall limitation and the specific

holddowns we shall impose will be to encourage the movement of various affected recyclable commodities.

But if we are wrong in our judgment and in some now unforeseen manner movement of a particular commodity involved in the recycling process should be adversely affected, we believe that any resulting harm to the environment would not be so significant as to warrant relief. In this respect, we find that the cost to the Nation's railroads in terms of the loss of badly needed additional revenue, outweighs, on balance, that harm.

Our order in this proceeding provides that the increases authorized herein may be implemented upon 15 days' notice to the Commission and the general public. Having in mind the carriers' urgent need for prompt revenue relief, we believe that period, albeit brief, is necessary and will provide adequate time for shippers and other affected interests to make required commercial adjustments. However, in view of the court's injunction and its interpretation of the notice requirements of NEPA, we are constrained to make an exception in the case of commodities moving in the recycling process. As to those commodities, interested persons may submit, through the filing of appropriate petitions, their views concerning environmental aspects of this case within 25 days of the date of service of this report; and our order prohibits the carriers from making effective authorized increases relating thereto except upon 35 days' notice.

Increases Proposed

We now turn our attention to the specific tariff proposals whereby respondents seek to obtain the additional revenue found to be required.

Surcharge.—At the outset, we find the temporary 2.5-percent surcharge tariff X-281, to the extent permitted to become effective by our order of February 1, 1972, as amended, and as modified with respect to recyclable materials pursuant to the injunction entered on July 15, 1972, by the United States District Court for the District of Columbia, was responsive to an immediate and critical revenue need of the Nation's railroads and was just and reasonable and otherwise consistent with the act during the limited period of its applicability.

In this connection, we observe that the surcharge (1) was applied to recyclable materials for a period of less than 6 months and will terminate in its entirety upon implementation of the supplanting in-

creases authorized in this report; (2) involves a single-level increase applicable nationwide with relatively few exceptions (principally in the southern district), and thereby maintained the *status quo* at least with respect to relative rate relationships; and (3) was established at a relatively low level compared to cost escalation actually experienced by respondents subsequent to the close of the evidentiary record in the prior case.

In these circumstances, and upon consideration of the whole record before us, we are persuaded that any adverse effects on shippers and upon the quality of the human environment resulting from the surcharge are outweighed, on balance, by the deterioration of essential railroad services which would have occurred had respondents not obtained the benefit of the additional revenues derived therefrom.

Selective increases.—The increases proposed in tariff X-281-A, however, present a different and far more complex situation. As noted, they are permanent increases intended to supplant the surcharge and are sought to be applied on a selective basis with numerous commodities and services taking different levels of rates and charges ranging up to 10 percent both within major districts and interterritorially.

As a consequence, the burden of meeting respondents' overall revenue needs falls disproportionately on certain commodities and services and on others not at all; and this circumstance has given rise to the greatest volume of protests in this proceeding.

Selectivity, however, is not a newborn phenomenon. Historically, so-called "across-the-board" single-level general increase proposals have had a selective aspect since, invariably, they contained provisions excepting certain commodities or services from application of the increase either in whole or in part.

The principal reason for this was, and continues to be, a practical one: an awareness that certain traffic will not move at all or will be diverted to other modes if made subject to higher rate levels. As to such traffic, therefore, blanket or uniform application of a general increase would be counterproductive. Instead of producing additional needed income, an actual loss of revenue would result.

In recognition of this loss-susceptibility factor inherent in across-the-board single percentage increases, we have not required that the burden of meeting established rail general revenue needs be distributed evenly over all traffic. Out of necessity, that burden has been placed principally on that segment of the total railroad traffic

base considered capable of bearing (without likelihood of significant revenue loss) increased rates and charges, subject to holddowns and other limitations imposed by us to prevent unjust discrimination and undue preference and prejudice or where otherwise warranted in the public interest.

Accordingly, the fact that the increases here involved are *selective* serves simply to emphasize, rather than newly to create, a circumstance present particularly in general increase tariffs considered in recent years. In the latter tariffs, the number of exceptions and individual line flag-outs progressively reached a point where we indicated that a selective approach in form would be more informative to shippers and the public as to the increases actually proposed to be applied on each commodity or commodity group. Compare, prior case (at pages 135-136) and *Increased Freight Rates, 1968*, 332 I.C.C. 714, 715.

This expectation has been realized only partially in the instant selective increase proposal because as filed and supplemented, it too contains a plethora of exceptions and has been followed by a veritable myriad of partial or complete flag-outs by individual lines, each apparently prompted by fear of loss or diversion in the event particular selective increases were fully applied to their traffic. Despite these circumstances, the tariff, in our judgment, remains sufficiently broad in scope to retain the nature of a general revenue measure since, viewed in its totality, it affects the entire rate structure and is intended as a response to an immediate overall revenue need of the railroad industry.

Nevertheless, we are acutely aware, as respondents must be, that the continued and increasing erosion of the traffic base available for meeting those needs constitutes a clear warning that the time fast approaches (and, indeed, may have arrived) when they can no longer expect any significant revenue relief via the avenue of a general increase. Greater reliance must be placed on other means, including self-help by attracting additional revenue through redoubled efforts to improve service, by reducing expenses through prudent cost-cutting and further increases in productivity, by seeking specific rate adjustments addressed to circumstances surrounding particular movements of traffic, and, where adequately justified, by obtaining outside assistance to preserve services which, though required in the public interest, fail to yield an adequate return.

Another contention made by numerous opposing parties is that proposed increases are unjust because present rates on commodities

shipped by them return revenues in excess of variable or, in some instances, fully allocated cost. A related contention is that increases sought to be applied on certain types of movements are disproportionate to cost escalations attributable to such movements. However, neither circumstances is sufficient in itself to warrant disapproval.

The present rate structure is a highly pragmatic creation developed over many years and contains hundreds of thousands of rates and charges, which, while within a "zone of reasonableness," make widely varying contrbutions to net revenue. *Sugarcane From South Florida to Clewiston, Fla.*, 281 I.C.C. 47, 63. In an ordinary case, determination of whether a particular rate exceeds a reasonable level is based on a host of variable circumstances and conditions surrounding the movement of particular commodities, including competitive factors and detailed cost and traffic studies; and even when rates are found to yield revenues substantially above fully allocated costs they are not necessarily in excess of a maximum reasonable level. *General Motors Corp.* v. *New York Central R. Co.*, 311 I.C.C. 622, 625.[17]

In these circumstances, to give individual consideration to the massive volume of rates involved in a proceeding of this type would make impossible the effective and timely prosecution of our regulatory function. *United States* v. *Louisiana*, 290 U.S. 70, 76.

Rather, primary consideration in general revenue cases must be given to the general bases of rates and charges being proposed in light of broad policy considerations expressed in the national transportation policy, section 15a(2) of the act, the Hoch-Smith Resolution and, more recently, the Economic Stabilization Program, and the National Environmental Policy Act, 1969.

In this connection, we emphasize the permissive nature of this proceeding. Our conclusions do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. Thus we do not purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370.

[17] Whether and to what extent this situation can and should be changed is the subject of a major investigation proceeding we have instituted in Ex Parte No. 270 See *Investigation of Railroad Freight Rate Structure, supra.*

Accordingly, we are prepared to receive and promptly investigate complaints from any persons concerning individual rates; and where maladjustments are found to exist an adequate remedy by way of refund or reparations will be provided. *Atlantic City Electric Company* v. *United States*, 306 F. Supp. 338 (1969), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (1969), both affirmed *per curiam, sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73 (1970). That avenue of relief is particularly appropriate to the various protestants herein whose evidence and arguments are based on claimed inequities which are not created by the instant proposal but rather arise from preexisting rate relationships, many of long standing.

Where, as here, respondents have shown a substantial and compelling need for immediate revenue relief, their judgment in apportioning the burden of meeting that need among varying segments of traffic should be accorded due weight since, presumptively, it reflects an intimate awareness of the degree to which certain traffic is capable of bearing increased rates, and every imposed adjustment will result in a loss of needed revenue.

But this does not mean that respondents are free of substantial evidentiary burdens. As a bare minimum they must show that their judgment is soundly based and does not create situations involving discrimination and preference and prejudice proscribed by the act or which otherwise contravene established policy. The public interest in the maintenance of a lawful rate structure must prevail over respondents' revenue need, however pressing.

As will be seen from our subsequent consideration of specific movements, whenever respondents have failed to meet this burden we have granted relief to aggrieved shippers and localities, including holddowns and exceptions to maintain established market relationships and to remove unduly harsh effects on long-haul traffic resulting from application of uniform percentage increases.

In addition, our review of the entire record, particularly testimony adduced at the oral hearings, persuades us that lack of adequate evidentiary support is most pronounced, indeed general, with respect to the higher levels of increases here proposed. As to those levels, we have found that respondents' justification consists almost entirely of general assertions to the effect that competition

and other factors[18] were considered. No attempt was made to specify the relative weight accorded any of these matters in their decision to single out certain movements for higher increases; and when, on cross-examination, it appeared that one factor was more prominent than others, underlying supporting data either was unavailable or not supplied when requested by opposing counsel at the oral hearing.

This evidentiary deficiency is illustrated by the following examples:

(a) The proposed $7.50 per car increase in minimum charges on pulpwood (in contrast to a $5.00 increase in similar charges sought to be applied on other traffic generally) results in an average rate increase of 8 to 8.5 percent on certain short-haul movements. On cross examination, a respondent witness explained this disparate treatment by referring to a "study" which purportedly showed that pulpwood was being carried at a loss. That study, however, was not made available upon request of opposing counsel. See transcript pages 87-91 (witness Lawrence), 246-249 (witness Emerson), and 423-436 (witness Souby).

The relevant issue here is not whether the proposed increased charge exceeds a maximum reasonable level (a proper consideration in a *rate* as opposed to a general *revenue* case) but, rather, whether the respondents were correct in their judgment that pulpwood traffic moves at depressed rates. If the study in fact is unreliable then they may have been unduly influenced by that circumstance in singling out pulpwood for a higher increase.

(b) A second example concerns a sought 10-percent increase:

[Protestant counsel Bercovici to witness Souby, cf. transcript pages 440-441]

Q. Do you recall the discussion of the increases on manufactured plastic products?
A. I don't recall the particular commodity, the discussions on it, no. At this particular meeting, I do recall something was mentioned but I really couldn't give you any answer.
Q. Would you be able to tell us if any studies were made on the amount of traffic, the direction of traffic, the productivity produced by the manufactured plastic product?
A. I don't know whether any were made at all.

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[18] As stated by witness Souby, Chairman of the Executive Committee of the Western Railroad Traffic Association and participant in the negotiations of chief railroad traffic officers which resulted in the selective increase proposal, these other factors "included such items as types of equipment required, contribution received from present rate levels, competition from other modes, market competitive factors, inter-commodity competition, as well as situations involving specific movements of traffic."

[and continuing on page 628, another witness]

Q. Mr. Feldman, before coming here to this hearing, or before preparing your statement which is designated as VS 64, did you review any of the documentation which underlied the work of the railroad committees in deriving these increases?
A. No, sir. As I indicated to you previously these were increases determined by our chief traffic officers which I had no participation in.

(c) Another example:

[Protestant counsel (Costello) to witness Miner transcript page 703]

Q. Well, do you know of any evidence that the railroads have put in at all [in their initial statements] in justification of the proposed ten percent increase in sugar beet rates?
A. No, I just indicated I did not know whether they entered any evidence specifically in connection with sugar beets.

[continuing on page 704, same witness]

Q. * * * would you consider that [your reply verified statements are] to be considered * * * [as] justifying the ten percent increase?
A. No, I would say that [my statement] is not the only justification.
Q. Do you know of any other justification?
A. Not specifically on sugar beets.

[continuing on page 729]

Q. Mr. Miner, have you made any specific investigation of the operating conditions in the rail sugar beet movement?
A. No.

[and on page 730]

Q. Have you made a study of the question of diversion?
A. No, sir.

(d) Another:

[Protestant counsel Simonds to witness Smith, cf. transcript pages 492-495]

Q. Mr. Smith, I assume you participated in the decision or determination in this proceeding to increase petroleum [coke] rates 8 percent and 10 percent, depending upon where the movement is, but to only increase bituminous coal rates 4 to 5 percent depending upon where the movement is. What I want you to state for the record—I want you to describe your role in that determination, what your recommendation was if you made a recommendation to the traffic committee, et cetera?

A. My activity in proceedings of this nature or meetings that lead up to the development of a revenue case is one of presiding at the meetings and determining the wishes of the railroads. The railroads decide what these increases will be, the chairmen do not decide that.
Q. But you are the railroads' spokesman in this proceeding?
A. That is correct.
Q. In making this decision, Mr. Smith, to increase petroleum coke rates at a higher level, percentage level than bituminous coal rates, what studies did the carriers make in reaching that determination?
A. Those individual studies were not available to me. The way those meetings come about, the railroads make their individual and separate studies involving their own properties and their own rates, they come to a meeting and jointly agree upon a common increase that all can proceed on. There are no specific or general studies for a territory as a whole, in other words, there was not one single study on petroleum coke throughout eastern territory.
Q. I take it, Mr. Smith, that something must have gone into the determination to recommend or to propose a ten percent, an 8 percent increase on petroleum coke and yet only a four to five percent increase on bituminous coal and what I am trying to find out for the benefit of the Commission is what kind of studies were made to justify that. This in effect was a selective increase, was it not?
A. Yes.
Q. Can you help us at all?
A. I can't help you as to how the individual railroads made their individual studies and arrived at 8 percent on petroleum coke in the east and 10 percent interritorial from the west to the east.
Q. Do you know whether any studies were made?
A. I presume there have been.
Q. But you are not aware of them?
A. I am not aware of the specific studies.
Q. And you are not aware of the cost studies?
A. No sir.
Q. And you are not aware of any marketing studies that were made?
A. I am not aware of any specifically, no.

(e) And another:

[Protestant counsel (Harrington) to witness Miner concerning a sought 6-percent increase on citrus fruit, subject to an additional 6 percent when moving in protective service, at transcript pages 355-356]

Q. Did you make any study to see whether you were right or wrong in your judgment [that a prior general increase would not result in substantial diversion]?
A. * * * I have not made a study * * * There has been a diversion, I will grant that. I mean a loss. Now I will take back the word "diversion". There has been a loss but I am not prepared to say that the freight rate increases had any effect one way or the other or what effect it might have had, if any.
Q. You did not make any study whether or not it had any effect?
A. No.

In view of this general evidentiary deficiency, we believe that overall relief in the form of uniform maximum increase limitations within and between the major districts is warranted. Accordingly, having considered the relative revenue needs of carriers operating within those districts, no increase will be authorized herein in excess of 4 percent within the South, 5 percent within the West, 6 percent within the East, and 6 percent interterritorially; and we find proposed increases above those limits not shown to be just and reasonable.

Discrimination.—By virtue of its very magnitude and differing rate levels, the selective increase tariff carries with it an enhanced likelihood that undue disruption of existing market patterns or relationships will result from its application in specific instances, particularly in situations involving border points and need for concurrences by individual carriers in rates appurtenant to through routes. In our subsequent analysis of the proposal as it applies to particular movements, we have attempted to preclude such discriminations whenever they have appeared. We recognize, however, that situations of this type, now unforeseen, may occur in the implementation of increases authorized in this proceeding. Accordingly, we emphasize that our order herein is not to be construed as approving increases which result in prohibited discrimination, preference, or prejudice; and should situations of that type be brought to our attention we shall provide prompt and effective relief to any injured parties.

Ports.—Nor is our order intended to authorize any disruption of established port relationships.[19] To warrant that result in a general revenue proceeding, evidence of changed circumstances far more detailed than that provided by respondents is required. Respondents, therefore, are required to maintain and preserve all existing port relationships (including those involving Great Lakes and Pacific coast ports) duly established by order of the Commission or recognized customs of the trade. Any disruption in such relationships arising out of the publication of tariffs pursuant to authority herein granted shall be promptly corrected.

In particular, we find that such disruption will occur as a result of provisions in tariff X-281-A whereby: (1) increases are proposed by western and southern carriers on export-import movements in trailer bodies, semitrailers, vehicles or containers on flatcars, both

[19] Under tariff X-281-A traffic moving in the export-import trade (including carload and TOFC/COFC) are assigned the same levels of increase applicable on domestic movements of the same commodities.

loaded and empty, while no increase is proposed by eastern carriers, and (2) Mississippi River crossings from Memphis to New Orleans are excluded from the description of southern territory in note 17, thereby unduly preferring shippers at other points in that territory.

Private equipment.—Certain protestants contend that no increase be permitted on commodities which move in cars furnished by shippers and that any charges assessed for services in connection with the movement of such equipment, whether empty or loaded, be exempted from any increase. In support of this position they argue that present milage allowances fail adequately to reflect actual ownership costs.

In our opinion, the appropriate method of compensation for use of privately owned cars is through allowances rather than adjustments in line-haul rates. Protestants' proper recourse should be by complaint alleging unlawfulness in existing allowance levels. In this connection, we note that proposals to subject empty covered hopper cars to a new 10-cent-per-mile charge and to current diversion and reconsignment charges presently are the subject of two separate investigations (in Docket No. 35363, Handling of Empty Tank and Freight Cars, U.S.A., and Docket No. 35419, Handling of Empty Rail Cars of Private Ownership, U.S.A.). Accordingly, the sought relief is denied as beyond the scope of this proceeding.

Stopoff charges.—Respondents propose to increase the charges for stopping cars or for stopping to complete loading or to partially unload by 6 percent, except in southern and western territory where the charge for this eervice would be increased to $50 per car if the present per-car charge is less than $50.

The level of the increase, particularly in the South, is opposed as excessive, unreasonable, and unjustified by numerous protestants including the Secretary of Agriculture, the Southern Hardwood Traffic Association, the Associated Cooperage Industries of America, and 13 freight forwarders. Protestants characterize the privilege of stopping in transit as an incentive to encourage heavier loading and a means of preventing diversion to motor carriers. The proposed increase will raise the charge from $35.73 (at the Ex Parte No. 267-B level) to $50 or 39.9 percent in southern territory and from $44.05 to $50, or 13.5 percent, in western territory. In the East, the charge will be increased to $47.53. Protestants argue that these charges have been raised eight times since 1967; they do not comport with increases of 0-10 percent proposed on other commodities and services; that the increase in southern territory substantially exceeds the charge found just and reasonable in a 1970

proceeding; and that the percentage increase in the South is of such import as to warrant handling in a separate proceeding rather than as part of a general increase proposal.

Citing data developed by the Commission's Bureau of Accounts and published in statement No. 5-69, the Secretary of Agriculture asserts that the 1969 cost of stopping a car in transit in southern territory was $31.42. Adjusted to reflect current cost levels, he computes the fully allocated per-car cost as $36.41. Since the present charge in southern territory is $36.62, including the 2.5-percent emergency surcharge, the Secretary contends that it is adequately compensatory and that the proposed increase has not been justified.

Protestants also urge that continued increases in these charges will defeat the purposes for which the charges were established, and that the proposed increase violates section 3 in that it results in a greater increase to be absorbed by the small pool car buyer as compared with single carload shippers, thus allegedly, unduly preferring the latter. In reply to these contentions, the respondents state it is their duty to assess compensatory charges for this service. See *Stopping-In-Transit Charges & Restrictions*, 337 I.C.C. 605. In view of 1969 costs submitted by western and eastern lines of $47.64 and $49.73, respectively, and accepted by the Commission in the *Stopping-In-Transit* case, *supra*, the respondents claim there can be no serious argument with regard to the reasonableness of the considered charges. The proposals approximate nationwide uniformity and, according to the carriers, should be viewed as reasonable and nondiscriminatory.

As buyers of volume rail service, the protesting freight forwarders explain that their cars move daily between terminals in batteries of two or more and that utilization of the usual stopoff methods would be inefficient to both forwarders and carriers in terms of cost and transit time. The forwarders discuss various tariff stopoff provisions which have enabled smaller forwarder terminals to move freight directly in rail service. Should these charges be increased so that utilization of the provisions becomes uneconomical, then freight from and to the small terminals would be diverted to over-the-road movements. The forwarders further point out that cars placed for loading at a stopoff point in eastern or southern territory are subject to so-called "marriage rules" which provide separate charges ($22.40 in eastern territory and $21.43 in southern territory) in addition to stopoff charges. Thus, it is claimed that forwarders are

"doubly jeopardized" since the increase would apply separately to both charges.

The carriers respond to the forwarders' arguments by stressing the fact that use of stopoff provisions and marriage rules and charges results in more favorable line-haul rates than would otherwise be applicable on such shipments. Respondents also emphasize that the charge for "marriage" of cars is a separate matter, a charge which has been justified in the past on the basis of the additional expense involved in such service over and above that provided for actual stopoffs.

Protestants do not deny that the railroads' costs have increased. Stopping in transit for partial loading and unloading is a service which is beneficial to shippers, and no reason appears why this service should not bear a portion of the carriers' revenue requirements. In our judgment, the 6-percent increase proposed in the East is not excessive, and we find it to be just and reasonable. However, the proposal to increase stopoff charges to $50 per car in western and southern territory results in percentage increases far in excess of those herein proposed or authorized on other commodities and services. It is our view that the evidence of record is inadequate to justify increases of the magnitude proposed; accordingly, we conclude that charges for stopping cars in the South and West may be increased by 4 percent and 5 percent, respectively, the same percentages authorized for other traffic within those territories.

Lighterage.—Respondents propose an increase of 6 percent on lighterage service. Protestants, Port of New York Authority and the city of New York, request that no increase be permitted in the charges of the Penn Central Transportation Co. (Penn Central) for lighterage service at New York Harbor. By decision served March 28, 1972, the Commission, division 2, authorized Penn Central to establish charges of $6.26 and $5.97 per ton, respectively, on domestic and waterborne lighterage traffic in lieu of the higher charges proposed therein. I. & S. Docket No. 8645, Charges at New York Harbor, Penn Central Transportation Co., decided March 21, 1972 (petitions for reconsideration are pending).

In arriving at the charges of $6.26 and $5.97 per ton, the Commission found that these amounts reflected specific costs of the services involved. Protestants feel the same reasoning and logic require disapproval of the 6-percent increase here proposed. They contend the record in I. & S. No. 8645 contains evidence of costs and operations as recent as August 1971, and that it would, therefore, be inappropriate to grant further increases.

Respondents recognize that the charges approved in I. & S. Docket No. 8645 are based on specific costs of performing the involved services. However, they contend that the costs used to justify the charges were based on 1969 operations and no attempt was made to reflect the wage and price increases which formed the basis for the increases authorized in Ex Parte Nos. 265 and 267. Respondents also show that since 1969 there have been increases in the expense of performing the services under consideration. Two of the most prominent items of cost lie in the stevedoring labor at railroad and steamship piers. Shown below are the contract rates paid for each of these services over the past few years.

Jersey Contractors (Greenville Piers, N.J.)

Year	Boxcars	Percent	Open top	Percent
	Cents		*Cents*	
1969	240 NT	100	181 NT	100
1970	269 NT	112	203 NT	112
1971	296 NT	123	223 NT	123
1972[1]	314 NT	131	236 NT	130

[1]Effective January 1, 1972.

Wm. Spencer & Sons Corp.[1]

Year	Eastbound	Percent	Westbound	Percent
	Cents		*Cents*	
1969	217 NT	100	265 NT	100
1970	226 1/2 NT	104	276 1/2 NT	104
1971	240 1/2 NT	111	293 1/2 NT	111

[1]To October 1, 1971, thereafter, New York Terminal Conference, F.M.C. Lighterage Tariff No. 3, October 1, 1971.

Thus, on domestic lighterage traffic in boxcars, the labor cost involved in the transfer between car and lighter has increased 74 cents per net ton since 1969, whereas the proposed 6-percent increase applied to the approved charge of $6.26 per ton would amount to 38 cents per ton. Similarly, the proposed 6-percent increase if applied to the sum of the charges of $5.97 per ton for waterborne lighterage traffic and $3.20 per ton on all waterborne traffic would amount to 55 cents per ton.

In light of the recent increases authorized in I. & S. No. 8645 and record before us, we conclude that no increase should be authorized on this service.

Perishable protective service.—Respondents propose to increase the charges on mechanical protective service, water-ice and salt (ice bunker) protective service, and heater protective service by 6 percent. Charges for detention of the cars used for this service are proposed to be increased by a similar amount.

Protestants include shippers and groups concerned with movement of fresh and frozen fruits and vegetables, as well as meats, and they contend that mechanical protective service charges and water-ice protective service charges should be exempted from this proceeding or denied.

Protestants point out that division 2, in *Mechanical Protective Serv. of Perishables—Nationwide*, 340 I.C.C. 470 (1972), found that increased charges for mechanical protective service were not shown to be just and reasonable. Further, they observe that the pending docket No. 35400, Increased Charges for Perishable Protective Service, involves increased charges for water-ice refrigeration. Therefore, according to protestants, the instant proceeding is not the proper forum to determine what the level of these charges should be. Also, protestants argue that these protective service charges should not contain a penalty or detention charge to secure release of the car as here proposed, but only a charge based on costs for use of the car by shippers beyond the alloted free time. Respondents reply that the increase sought in *Mechanical Protective Serv. of Perishables—Nationwide, supra,* was denied because it was based on a formula designed to restructure the mechanical refrigeration rates, which formula was found defective, not the need for an increase. Also, they claim that increases are proposed on icing services in this proceeding because the railroads must have additional revenues to meet increased costs while the other formal docket is being processed. Thus, consideration and approval of the proposed increases in this respect, assertedly, should not be barred in the instant general revenue proceeding.

Protestants complain that numerous icing stations are being phased out. For example, since 1960, the 18 principal railroads have reduced the number of icing stations from 317 to 168, which reduction in service is allegedly tantamount to increases in rates, even though the rates per se have not increased since 1956. Respondents, on the other hand, stress that the need for icing

stations has diminished, primarily on account of the displacement of ice bunker cars with mechanical refrigeration cars to protect perishable traffic.

Both sides have introduced conflicting evidence as to the cost of providing perishable protective service by the railroads.

In *Mechanical Protective Serv. of Perishables—Nationwide, supra,* prior attempts to increase rates on perishable protective service in general revenue proceedings was discussed at page 479, as follows:

> * * * it became apparent that increases in protective service charges would not be permitted in the absence of an elaborate cost presentation. Such a presentation is not susceptible to use in general increase cases which are primarily revenue need cases.

We affirm that conclusion here; and, accordingly, the proposed increases on perishable protective services, including proposed increased detention charges, will be ordered canceled.[20]

COMMODITY GROUPS

* * * * *

Secondary materials.—Increases proposed on secondary materials, including waste or scrap paper, textile waste, nonferrous

metallic scrap, and rubber or plastic scrap or waste, are set forth below:

Paper, waste or scrap	On rates subject to minimum weights less than 80,000 pounds, 8 percent;
	On rates subject to minimum weights 80,000 pounds or more, 3 percent.
	Shipments moving wholly between points on the Florida East Coast Railway, no increase.
Textile waste	6 percent, except from, to, and within the South no increase.
Nonferrous metallic scrap	5 percent, except within East or from South to East 4 percent; to South 3 percent; within the South no increase.
Glass scrap or waste	4 percent, except to or within the South 3 percent.
Rubber or plastic scrap or waste	

Shippers of secondary materials state these waste commodities are extremely low valued and that transportation charges are determinative of whether they can be marketed. Protestants allege that an increase in rail rates will either bring about diversion of these articles to highway transportation or they simply will not move, in which case the environment will suffer. Protestants further allege that both present and proposed rates reflect a bias in favor of competing virgin materials since rates on secondary materials represent too high a percentage of the value of such waste commodities. Finally, protestants question the propriety of the 8-percent increase proposed for paper, waste or scrap, which presently moves on 40,000- and 50,000-pound rates, since only a 3-percent increase is proposed on rates subject to minima of 80,000 pounds and more.

The salvage industry consisted in 1967 of 7,927 establishments, employing 79,000 people and with total sales of $4.4 billion. Of these establishments, 3,862 were primarily engaged in handling iron and steel scrap and 4,075 were primarily engaged in handling nonferrous metals and other secondary materials. Iron and steel scrap accounted for almost one-half of the total sales and copper scrap about one-fifth.

Commodity	Sales ($000)	Percent of total
Iron and steel scrap	2,166,940	48.7
Copper-base scrap	895,474	20.1
Wastepaper	378,019	8.5
Waste rags, textile waste, wiping cloths	316,377	7.1
Aluminum scrap	233,820	5.3
Lead scrap	94,989	2.1
Zinc scrap	29,334	0.6
Other nonferrous metallic scrap	227,362	5.1
Other scrap and waste materials	111,358	2.5
Total	4,453,673	100.0

The market for secondary materials is generally characterized by a large number of relatively small sellers and a smaller number of relatively large buyers. The sellers, who deal in raw material substitutes, have minimal influence on prices and thus must accept the price offered by the purchaser. This price is basically determined by demand, which in turn is influenced by general economic conditions and the relative availability and cost of primary materials. Largely because of the nature of the seller/buyer relationships and changes in demand, secondary material prices exhibit a high degree of volatility, fluctuating from day to day, week to week, or month to month. This is in sharp contrast to relative stability in the market for the corresponding primary materials.

Price of secondary materials are quoted in various ways. Depending on the commodity, the freight may be paid by the buyer or the seller. Where the seller pays the freight, he tends to protect his earning situation by lowering the price which he is willing to pay to the collector or other source of the scrap. These sources, large in number and individually small in size, have little or no influence on the prices they receive. Due to the low value of these waste commodities, freight rates tend to represent a high percentage of the prices. Protestants maintain that increases in rail freight rates thus tend to elevate prices beyond the level which purchasers are willing to pay, thereby causing these commodities to move by truck or not to move at all. Thus, protestants submit that the recent series of general rail freight rate increases, totalling approximately 40

percent, have prevented over 1 billion pounds of textile wastes from moving to potential consumers.

Protestants state that less than 3 percent of the potential tonnage of textile waste is moved in commerce, and only a fraction of this is moved by rail. Freight charges average 20 to 30 percent of the total sales price of textile products. In some high volume items, freight charges are as much as 60 to 70 percent of the sales price. Thus, the sales price of mixed synthetics is about $2.30 per hundredweight, whereas the freight rate from Buffalo, N.Y., to Arrowhead, N.Y., is $1.11 per hundredweight, or 48 percent of the sales price. Similarly, on sweepings from Buffalo to Toronto, Canada, the sale price is $1.75 per hundredweight and the freight rate is $1.37, which equals 78 percent of the price.

Respondents presented the following table to show that prices on wiping materials range from $10.50 to $20 per hundredweight, and that prices have risen.

Waste material prices—wiping materials New York

	Cents per pound	
	February 1970	December 1971
No. 1 White wipers	16 -17	17 -18
No. 2 White wipers	13 -14	13½-14½
No. 3 White wipers	9 - 9½	10½-11
No. 1 ganzies, selected	18½-19	19 -20
No. 2 ganzies	14 -15	15 -16

However, protestants urge that textile wastes consist of far more roofing rags, shredding rags, fiber rags, and cuttings than wiping material. The tables shown below demonstrate the market value for these bulk grades and various grades, after sorting, and the relationship of freight to value. "Carload Waybill Statistics, 1969," public statement TD-1, indicates the average haul of textile waste to be 527 miles at an average tonnage of 24.7. The applicable rate for this average haul, from Agent Mauer's Tariff E-2009-series, of 63 cents per hundredweight, minimum weight 50,000 pounds, would produce charges of $315 per car. Protestants have used this rate in computing the percentages of freight to value in the tables below.

Mixed rags	Price per hundredweight		Percentage of freight to value	
New York		$2.50		25.2
Boston		2.50		25.2
Chicago		2.25		28.0
Philadelphia		2.00		31.5
Roofing rags	*New York*	*Chicago*	*New York*	*Chicago*
No. 1	Nominal	-------	-------	------
No. 2	-- do --	0.55	-------	114.5
No. 3	$.40	0.35	157.5	180.0
Cloth strippings	1.25	-------	50.4	------
No. 1 laundry nets	8.25	8.75	7.6	7.2
Mixed laundry nets	6.50	5.50	9.6	11.4
Mixed cotton, overalls/pants	2.50	3.00	25.2	21.0
No. 1 old blue overalls	3.00	3.50	21.0	18.0
New cotton cuttings				
No. 1 white shirts		8.90		7.8
Unbleached muslin		11.50		5.4
White shirt for export		4.75		13.2
No. 1 percales		4.00		15.75
No. 1 washable		2.50		25.2

The volume of wastepaper and board recycled annually over the past 10 years has averaged about 11 million tons. This represents about 20 percent of wastepapers generated annually and about 22 percent of the paper and board industry fiber requirements. There are more than 50 defined grades, each with its own fiber characteristics and market supply demand situation, and they range widely in price, from $2 per ton on No. 1 mixed paper to $80 per ton on manila tab cards. Respondents maintain that freight rates are not the controlling factor in marketing wastepaper. More than any other factor, the market price of the competitive virgin fiber, woodpulp, is allegedly determinative of whether wastepaper can be marketed. Moreover, factors such as segregation of wastepaper from other refuse and baling and preparing for shipment also bear an important part of the cost of marketing wastepaper.

In 1966, the railroads transported 7,768,023 tons of wastepaper. The volume rose to 8,064,428 tons in 1970, although there were four general freight rate increases during this period. Protestants state that freight rates on wastepaper have increased 31 percent beginning with Ex Parte No. 265 and including Ex Parte No. 267. However, respondents point out that because of the incentive rates which the carriers have made available to shippers of wastepaper, the rates per 100 pounds are today only slightly higher than the lowest available rates in 1964. The 80,000-pound incentive loading rates were estab-

lished May 10, 1964. More recently, incentive loading rates have been published subject to minima of 100,000 and 125,000 pounds. These rates are differentially lower than the 80,000-pound rates.

The table below shows the rates between representative points in 1964 at the Ex Parte No. 223 level and compares them with the rates presently in effect at the Ex Parte No. 267 level:

Comparison of rates on wastepaper in effect May 9, 1964, versus present rates at X-267-B level

From	To	28300 miles	Minimum weight	Effective May 9, 1964 X-223	Present X-267-B
Akron, Ohio	Coshocton, Ohio	74	40M	22½	32
			50M	20½	28
			80M	--------	23
			100M	--------	21
Do	Baltimore, Ohio	109	40M	27½	38
			50M	24½	34
			80M	--------	28
			100M	--------	26
Dayton, Ohio	Gypsum, Ohio	150	40M	29½	40
			50M	26½	37
			80M	--------	32
			100M	--------	28
Landover, Md	Lynchburg, Va	171	40M	32½	44
			50M	29½	40
			80M	--------	34
			100M	--------	33
Chicago, Ill	Vincennes, Ind	241	40M	38½	54
			50M	34½	47
			80M	--------	40
			100M	--------	37
Gypsum, Ohio	Boston, Mass	712	40M	65½	89
			50M	59½	81
			80M	--------	70
			100M	--------	62

The data above shows that from Akron, Ohio, to Coshocton, Ohio, the lowest available rate on wastepaper in effect May 9, 1964, at the Ex Parte No. 223 level was 20 1/2 cents per hundredweight. Seven years later, despite the intervening increases in rail freight rates, the lowest available rate per hundredweight is 21 cents, an increase of only one-half cent over this period in the rate per 100 pounds. The rate of 20 1/2 cents applied on shipments subject to a minimum weight of 50,000 pounds; the rate of 21 cents applies on shipments subject to a minumum weight of 100,000 pounds. Using the longer haul from Gypsum, Ohio, to Boston, Mass., the lowest available rate on May 9, 1964, at the Ex Parte No. 223 level was 59 1/2 cents (50,000 pounds minimum weight). Seven years later the lowest rate is 62 cents (100,000 pounds minimum weight).

Similarly, the nonferrous metal and alloy scrap industry has been granted downward rate adjustments throughout official territory. Incentive rail rates were established in 1963 covering a complete list of nonferrous metal scraps with minimum weights ranging from 40,000 to 80,000 pounds. Effective December 10, 1969, the eastern railroads published a further downward revision in the overall rate levels by establishing 100,000- and 120,000-pound incentive rate scales. These incentive rate scales and the lower rate levels resulted in an average load within official territory of 84,000 pounds on all nonferrous scrap metal, waste or tailings. The 120,000-pound rate level is relatively the same or below the rate level applicable approximately 9 years ago. In response to protestants' contention that nonferrous metal or alloy scraps are low value commodities which cannot absorb increases in freight rates, respondents have submitted the following quotations to demonstrate that many scrap metals have increased in price during the past 9 years:

Nonferrous metal scraps New York dealers buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	24 -24½	33 -34	+38.8
No. 2 heavy copper and wire	22 -22½	29 -30	+33.3
Light copper	19¾-20¼	27 -28	+38.3
No. 1 composition	20¼-20¾	29 -30	+44.6
Brass pipe	16 -16½	19 -20	+21.2
Auto radiators (unsweated)	15¼-15¾	21 -22	+39.7
Cocks and faucets	16½-17	20 -21	+23.5
Heavy yellow brass	14¼-14½	18 -19	+31.0
Soft scrap lead	6 - 6½	4 - 4½	-30.8
Battery lead plate	2 - 2½	---- - 1	-60.0
Clean hand picked type shells	5½- 6	6 - 6½	+ 8.3
Old zinc	3 - 3¼	3 - 3¼	--------
New die cast scrap	2¾- 3¼	3 - 3½	+ 7.7
New zinc clipping	5 - 5¼	6 - 6½	+23.8
Old die cast scrap	1¾- 2	2 - 2¼	+12.5
Block tin pipe	80 -85	110 -115	+35.3
No. 1 pewter	---- -60	72 -75	+25.0
No. 1 babbit (high grade)	---- -40	---- ----	--------
Solder joints	12 -21½	---- ----	--------
Pure nickel clips	53 -54	70 -75	+38.9
Rolled nickel anodes	55 -56	75 -85	+51.8
Nickel rod ends	53 -54	74 -85	+57.4
Nickel turnings	40 -41	55 -60	+46.3
New monel rods	25 -26	45 -50	+92.3
New monel clips	25 -26	48 -53	+103.8
Monel cast	20 -21	42 -48	+128.6
2S aluminum clippings	9¾-10¼	7½- 8	-23.8
Old aluminum sheet	7 - 7½	5½- 6	-20.0
Monel sheet	25 -26	42 -48	+84.6
Brass rod ends	---- ----	25 -26	--------

Nonferrous metal scraps Pittsburgh dealers buying prices in wholesale lots (cents per pound)

	Column 1 February 1963	Column 2 December 1971	Column 3 Increase or decrease
			Percent
No. 1 heavy copper and wire	22¾-23	38 -39	+69.6
No. 2 heavy copper and wire	21 -21¼	32 -33	+55.3
Light copper	19 -19¼	29 -30	+55.8
No. 1 composition	20½-20¾	30 -31	+49.4
No. 1 composition turnings	20 -20¼	---- ----	--------
Auto radiators	15 -15¼	23 -24	+57.4
Yellow brass	13 -13¼	19 -20	+50.9
New brass clippings	17¾-18	24 -25	+38.9
No. 1 brass rod turnings	14½-14¾	22 -23	+55.9
Aluminum castings	7½- 8	5½- 6½	-18.7
Aluminum borings and turnings	5¼- 5½	4 - 5	-9.1
Old zinc	3 - 3¼	4 - 5	+53.8
New zinc clippings	5¼- 5½	8 - 8½	+54.5
New die cast scrap	3½- 4	3 - 3½	-12.5
Type metal	7½- 7¾	9 -10	+32.1
Soft scrap lead	6½- 6¾	7½- 8	+18.5
Battery lead plates	----- 2	2 - 2¼	+12.5
Monel metal	23 -24	23 -24	+95.8
Cocks and faucets	----------	22 -23	--------
New brass clippings	----------	24 -25	--------
Mixed aluminum clips	----------	8 - 9	--------

Source: Secondary raw materials—Publication of the waste trade industry.

Protestants contend that the existing rate structure discriminates against secondary materials in favor of virgin raw materials and that the degree of discrimination has been compounded in recent years by Commission approval of flat percentage increases. Thus, in 1960, nonferrous scrap metal was charged an average of approximately 13 cents more per hundredweight than the ore of the same metal. The differential today is approximately 18 cents per hundredweight. Freight rates from the South and Southwest to major consuming markets in official territory are now between 1 and 1 1/2 cents per pound for metal scrap; this represents 2 to 5 percent of the delivered value of copper scrap, 8 to 15 percent of the delivered value of aluminum scrap, and 10 to 20 percent of the delivered value of stainless steel scrap. Respondents maintain that the comparison of rates on ores and concentrates with rates on nonferrous metal scrap is inappropriate because it compares 100 percent metals with ore or concentrates from which only a limited amount of metal can be recovered. Furthermore, the rail transportation characteristics of nonferrous metal scrap and ores or concentrates differ, for example, as to type of equipment, average loadings, and average hauls.

The following table is submitted by protestants to demonstrate rate bias existing against textile waste and in favor of competitive virgin materials within official territory:

Commodity	Value per hundredweight	Miles	Present rate	Proposed increase	Proposed rate	Percent of freight to value
		From Franklin, Ohio, to Adams, Mass.				
			Hundredweight	*Percent*	*Hundredweight*	
Rag pulp	$27.50	699	115¢	3	118¢	4.2
Rag (unbleached muslin)	11.50	699	80¢	6	85¢	7.3
		From Franklin, Ohio, to Turner Falls, Mass.				
Rag pulp	21.25	730	116¢	3	119¢	5.6
Rag (No. 1 percales)	4.00	730	81¢	6	86¢	21.5

As stated, the average loading for textile wastes is about 24.7 tons per car. The value of a carload of textile waste would be $5,500 as a minimum, according to respondents, whereas the application of a 6-percent increase within the East results in an average increase of $18.67 per car.

The many grades of paper waste are generally divided into five broad classes: mixed, news, corrugated, high-grade pulp substitutes and high-grade drinking. Under most market conditions, the latter two classes have very little difficulty in moving substantial distances in competition with virgin woodpulp. In a poor market, the mixed classes, and to some extent the news and corrugated classes, face difficulty in moving. These grades also constitute the largest volume of wastepaper and paperboard available for recycling or for disposal as solid waste. The controlling factor in the movement of the lower grades would appear to be the fiber demand at the consuming mills, along with the available supply and price, of virgin wood fiber. Protestants, however, contend that freight rates create a bias against wastepaper and in favor of virgin pulp. Thus, wastepaper has a selling price of about $40 per ton, and transportation costs approximate 75 percent of the value. Pulp, on the other hand, moving at 20 cents less per ton, has a selling price of $175 per ton, and the ratio of freight expense to price is only 17 percent.

Origin/destination	Woodpulp			Wastepaper		
	Cost per ton	Selling price[1]	Percent of freight to selling price	Cost per ton	Selling price[2]	Percent of freight to selling price
Portland, Oreg., to Fort Howard, Wis----	$29.80	$150.00	20	$30.00	$19.00	157
Los Angeles to east coast----------	31.60	150.00	21	42.20	19.00	222
Phoenix, Ariz., to Denver, Colo--------	23.20	150.00	15	30.00	19.00	157
San Antonio, Tex., to Santa Clara, Calif---	27.80	150.00	18	30.80	19.00	162

[1] Unbleached kraft.

[2] Corrugated containers.

Respondents maintain that any comparison of rates on woodpulp and wastepaper must take into consideration factors such as length of haul and revenue per car. The average length of haul on woodpulp is 865 miles, compared to 329 miles on wastepaper; the average revenue per car on woodpulp is $663 compared to only $247 on wastepaper. Respondents refer to the 100,000- and 125,000-pound incentive loading rates which are only slightly higher than the rates per 100 pounds available in 1964, despite the intervening ex parte increases. Respondents urge that scrap paper will still retain a significant rate advantage over woodpulp; it will also retain a significant rate advantage over pulpwood because it takes about three to four tons of pulpwood to make one ton of woodpuip, while scrap paper is converted on almost a one-to-one ratio. Thus, respondents do not expect the proposed increases to inhibit the movement of scrap paper.

Protestants forecast diversion of waste and scrap paper to motor carriers and a 30-percent decrease in rail tonnage if the proposed increase is allowed on the 40,000- and 50,000-pound minimum weight rates. Public statement TD-1 shows the average length of haul for wastepaper within official territory was 377 miles. Protestants aver that such a short distance makes the traffic highly susceptible to diversion, citing the dissenting opinions in Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 112 and 119.

Over the years 1967 to present, during which time there were several general increases in rates, the movement of scrap paper by rail has increased. Thus, the Southern Railway handled 430,000 tons of scrap paper in 1967, and approximately 530,000 tons in 1971.

During that time there was an increase in the tonnage each year. The volume of scrap paper handled by other major southern railroads shows a similar trend. In 1967, the Louisville & Nashville, Illinois Central, and Seaboard Coast Line handled 789,000 tons of waste and scrap paper, and that increased to 1,127,000 tons in 1971. The movement of scrap paper has also grown in the Nation as a whole between the years of 1967 and 1970 from 7,243,289 tons to 8,064,428 tons:

Wastepaper

Year	Carloads	Tons
1967----------	---------	7,243,289
1968----------	222,452	7,710,560
1969----------	228,997	7,976,596
1970----------	220,361	8,064,428

The reduction in cars in 1970 with a corresponding increase in tonnages is attributed to incentive loading rates established by the railroads.

While respondents propose to apply a 6-percent increase on textile wastes moving within and between territories other than Southern Freight Association territory, this proposal will not affect movements originating in the South where about two-thirds of the total textile wastes are presently produced. No increase is to be applied to textile wastes moving from, to, and within the South. Over the last few years, fluctuations in the movement of textile wastes by rail in the South have generally followed textile production. Southern carriers acknowledge that for the shorter distances this low value traffic is highly susceptible to diversion to motor common carrier and private motor carriage.

Protestants point out that the increase sought on the 40,000 and 50,000 pounds minima for wastepaper is 8 percent and only 3 percent is sought on rates subject to minimum weights of 80,000 pounds and more. The 3-percent increase is proposed in order to encourage use of the heavier incentive loading rates. Respondents contend the necessity for the 8-percent increase on the lower minima is borne out by the low per car earnings resulting from these rates and minimum weights. The average haul for scrap paper is 329 miles, and for that distance the 40,000 pounds rate is 59 cents and the 50,000 pounds rate is 54 cents. Accordingly, the per-car earnings at these rates are $236 and $270, respectively. These earnings are to be compared to the average per-car earnings on woodpulp of $663. As pointed out above, a substantial portion of the

wastepaper traffic moves under the incentive 80,000 and 100,000 pounds rates on which the proposed increase is 3 percent.

We are not convinced on this record that the considered secondary materials should be exempted from any increase. On the other hand, the low value of these articles, the relatively high percentage of freight charges to sales price, and their generally favorable transportation characteristics, appear to warrant some limitation upon the proposed increases. Balancing these factors against the carriers' need for additional revenue, we conclude that the increase on paper waste or scrap, textile waste, nonferrous metallic scrap, and glass, rubber or plastic scrap or waste shall not exceed 3 percent. This limitation will also have a beneficial effect upon the environment. While we have concluded elsewhere that secondary materials would continue to move despite the proposed increases, the holddown here imposed should encourage the movement and recycling of these commodities.

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Ferrous scrap, pig iron, and crude metallic iron or iron pellets.—The increase proposed on iron and steel scrap, pig iron, and crude metallic iron or iron pellets is 5 percent, except within the East or from the South to the East the increase proposed is 4 percent, and except to or within the South the increase proposed is 3 percent, minimum 15 cents per ton. The scrap iron and steel industry and one steel company (which uses scrap exclusively)

contend that scrap iron and steel is directly competitive with iron ore as an input for the steelmaking process and that any increase in scrap iron rates must be limited to that proposed on iron ore. Protestants, therefore, feel they are entitled to receive within the East the same 22 cents per gross ton maximum proposed on iron ore. Otherwise, it is alleged, scrap iron will be unjustly discriminated against, it will be less attractive in the market place, and the end result will be detrimental to the environment. Pig iron producers request that the Commission preserve the identity of treatment between pig iron and ferrous scrap in the event the Commission assigns a holddown to scrap for environmental reasons.

In *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55 (1962), division 2 concluded that the transportation characteristics of iron ore, pig iron, and scrap differ widely, and that there is no justification from a transportation standpoint for requiring a rigid relationship between the rates on scrap and the rates on iron ore or pig iron. Protestants, however, cite our conclusions in Ex Parte No. 256, *Increased Freight Rates, 1967*, 332 I.C.C. 280, to support their contention that the competition between iron ore and scrap requires identical rate treatment. Based on the modest record in that proceeding, we found that iron ore subjected to adequate beneficiation could be used interchangeably with scrap or pig iron in the steelmaking furnace, and we directed that the increases on scrap be held to those permitted on iron ore.

On the basis of a more complete record in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 I.C.C. 714, we concluded that scrap iron competes in the steelmaking furnace with pig iron and prereduced iron pellets having iron content of over 90 percent, and that iron ore is the primary component of the charge in the blast furnace, which produces pig iron. We permitted the application of a uniform increase of 5 percent, maximum 20 cents per ton to each commodity. In Ex Parte No. 262, *Increased Freight Rates, 1969*, we also found that a uniform percentage increase applied to the basic rates on both scrap iron and iron ore was equitable to both.

In Ex Parte No. 265 and Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971, supra*, we recognized that the competition of ferrous scrap is with pig iron and prereduced iron pellets as inputs for the steelmaking furnace. We found that iron ore and iron ore pellets having iron contents of less than 73 percent are distinct from any of these products, and are not used directly in the steelmaking process but must undergo processing to be concentrated into iron pellets with an iron content sufficiently high to be used, like scrap or

pig iron, in the making of steel, or must be processed in blast furnaces to make pig iron. We commented:

> There are differences in the transportation service performed by the railroads in connection with ferrous scrap and iron ore, including differences in the average length of haul, average weight per car, average size of shipment, and regularity of movement and general distribution. Evidence offered by the protestants, including testimony of expert witnesses, generally to the effect that all metallic sources compete, is not persuasive of their contention that scrap iron and iron ore specifically and directly compete to the extent that they require similar rate treatment. In the light of the demonstrated intervening processing required of ore to transform it into a competing product, we adhere to our conclusions in *Institute of Scrap Iron & Steel, Inc.*, v. *Akron, C. & Y. R.*, 316 I.C.C. 55.

The increases approved on commodities generally, including iron ore and iron ore pellets, in Ex Parte No. 267 were 14 percent within the East, 6 percent within the South, and 12 percent within the West and interterritorially. We concluded, however, that because Ex Parte No. 267 was supported in part by the need of the railroads for the improvement of their net revenues, that some allowance should be made for environmental considerations. For this reason the maximum increases allowed on iron and steel scrap was 11 percent. Because of the competition shown with iron and steel scrap, the increases granted on pig iron and iron pellets (or crude metallic iron) were also held to an 11-percent maximum.

The Institute of Scrap Iron and Steel, Inc. (the Institute), and Northwestern Steel and Wire Company request that the 22 cents per gross ton maximum increase proposed on iron ore also be applied to movements of ferrous scrap. The Institute maintains that iron ore and ferrous scrap are the basic metallic ingredients for the steelmaking process, that pig iron and hot metal, products of the blast furnace, are simply iron ore once removed, and that in every method of steelmaking currently employed, the steel manufacturer can use either iron ore or scrap iron interchangeably as a raw material in the making of new steel. Protestant concludes that since iron ore and ferrous scrap are the only sources of iron units (Fe), they are competitive and require the same rate treatment. Protestant further urges that a greater increase on scrap iron rates than on iron ore rates would inhibit the recycling of scrap and thus have a negative impact on the environment.

Respondents note that although the Commission concluded that there was no showing in Ex Parte No. 267 that the level of freight rates had anything to do with the removal of ferrous refuse, such as

abandoned automobiles, it nevertheless decided that some allowance should be made for environmental considerations, particularly since the railroads therein were seeking to improve their net revenues as well as to cover additional costs. However, respondents point out that here the additional revenues sought are insufficient even to cover increased costs. The proposed increase on scrap iron and steel is a vital part of the railroads' revenue program. As set forth in the following table, over one-half of the revenue derived from the proposed increase by the seven principal scrap-carrying eastern lines would accrue to such carriers as the Penn Central and the Reading, both which are in reorganization.

Scrap iron handling and revenue for principal iron and steel rail carriers

Railroad	October 1, 1970, to September 30, 1971		
	Carloads	Net tons	Total revenue
B&O	41,762	2,442,189	$14,004,920
B&LE	3,205	189,013	428,804
C&O	24,213	1,263,889	8,168,738
EL	12,794	706,515	2,752,117
N&W	28,325	1,609,700	6,056,089
PC	182,492	10,273,052	43,228,210
Rdg	22,182	1,305,058	3,570,413
Total	314,973	17,789,416	78,209,291

Respondents state that generally an abandoned automobile will provide 1.5 tons of ferrous scrap; refrigerators and other appliances will provide substantially less. In the former case, a 4-percent increase would mean about 34 cents per ton in the total cost of gathering and selling scrap. Respondents contend this increase is of no consequence in the context of a commodity that varies in price in terms of dollars from month to month and that varies by as much as $15 per ton from 1 year to the next.

The vast majority of the scrap iron consumed emanates within the steel mills in the form of home or revert scrap. This material arises because ingots must be cropped during rolling, because a part of the steel production may be defective, and for other reasons. The result is that the home scrap is available to be directly recycled into steel. At present, approximately 60 percent of the entire scrap volume used originates within the mills as home scrap. Because it is already

on site and is a valuable waste product, the mills generally recycle this scrap in preference to all other sources.

Contrasted with home scrap is the broad classification of purchased scrap. By definition, purchased scrap is that originating outside the mills for which a negotiated price is paid per iron unit. Purchased scrap arises from two distinctly different sources. The primary grouping, prompt industrial scrap, is created by steel fabricators such as automobile manufacturing plants in their operations. This material generally must be removed expeditiously to prevent interruption to the fabricating process. Because it has a known chemical composition, industrial scrap almost always re-enters the steelmaking cycle with little or no difficulty. Thus, this type of scrap does not constitute an environmental problem.

The second type of purchased scrap is obsolete scrap. This product results from the wearing out, corroding, breaking, deteriorating, or other obsolescence of an item which was discarded. Obsolete scrap generally does not possess the economic advantages of industrial scrap. It is not concentrated at particular geographic sites such as fabricating shops or plants. Its chemical composition is not precisely known, and ordinarily it is not easily processed to produce a metallurgically acceptable product for recycling into new steel. In the case of the junk car, and more particularly the abandoned junk car, to which much attention has been directed in the past several years, the real breakthrough has been a technological one. The scrap shredder or fragmentizer, by creating a higher quality scrap with fewer contaminants, has made possible the increased use of junk car scrap by both steel mills and foundries. The principal area of concern, among Federal and State agencies, is the removal of legal barriers to the fairly prompt disposal of abandoned cars. In any event, it is doubtful whether a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car hulk.

Purchased scrap accounts for approximately 40 percent of the total scrap charge, with industrial scrap accounting for about 16 percent of the total and obsolete scrap about 24 percent. In 1971, consumption of obsolete scrap was about 19 million short tons. This compares with about 80 million tons of pig iron consumed.

Freight rates on ferrous scrap are usually absorbed by the seller to meet competition. Since the seller pays the freight, he tends to protect his earnings situation by lowering the price which he is willing to pay to the collector or other source of the scrap. These

sources, large in number and individually small in size, have little or no influence on the prices quoted.

To establish the existence of freight rate discrimination between iron ore and ferrous scrap, protestants aver that there has been a steady decline in the movement of recyclable scrap and a steady decline in price. Respondents disagree. If the contentions of the scrap industry were true, respondents maintain, the result would have been a steady decline in the movement of scrap over the period 1967 to present when freight rates were rising, and a steady decline in price.

The price of scrap iron in the market place fluctuates with no apparent relationship to freight rates or freight rate increases. The following table shows composite prices for scrap iron, pig iron, and iron ore for 1957-1970. During this entire period, prices of pig iron and iron ore remained relatively stable, but the prices of scrap fluctuated from a low of $25.94 per ton to a high of $47.10 per ton. More to the point, there were no general freight rate increases during the period 1961-66, yet the composite price of No. 1 heavy melting scrap during that period fluctuated between $26.89 per ton and $36.37 per ton, a variation of almost 36 percent. On the other hand, the price of No. 1 heavy melting scrap rose from $27.63 to $41.25 per ton in the last 4-year period shown, when successive freight rate increases were being applied. The composite price of No. 1 heavy melting scrap declined from 1966 to 1967 and from 1967 to 1968. The Ex Parte No. 262 increase became effective in late 1969. That 6-percent increase applied to both iron and iron ore. In 1969, however, the composite price increased to $30.56 per ton and, in 1970, to $41.25 per ton.

Prices of iron and steel No. 1 heavy melting scrap, iron ores, and pig iron

	No. 1 heavy melting[1]	Pig iron	Mesabi Bessemer iron ores	Mesabi non-Bessemer iron ores
	in dollars per ton of 2,240 pounds			
1957	47.10	63.82	11.60	11.45
1958	37.81	65.95	11.60	11.45
1959	37.69	65.95	11.60	11.45
1960	33.20	65.95	11.60	11.45
1961	36.37	65.95	11.60	11.45

Prices of iron and steel No. 1 heavy melting scrap, iron ores, and pig iron—Continued

	No. 1 heavy melting[1]	Pig iron	Mesabi Bessemer iron ores	Mesabi non-Bessemer iron ores
	in dollars per ton of 2,240 pounds			
1962	28.34	65.46	10.80	10.65
1963	26.89	62.87	10.80	10.65
1964	36.50	62.75	10.70	10.55
1965	34.27	62.75	10.70	10.55
1966	30.66	62.75	10.70	10.55
1967	27.63	62.70	10.70	10.55
1968	25.94	62.70	10.70	10.55
1969	30.56	63.78	10.70	10.55
1970	41.25	69.33	[2]10.95	[2]10.80

[1]Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia, and Chicago, compiled from monthly averages published by American Metal Market.
[2]Effective January 1, 1970.

Protestant notes the respondents' table of prices of the bellweather grade No. 1 heavy melting scrap stopped with 1970. Protestant added the price for the year 1971, $34.46, and the price for January 1972, $33.09. The effect is to establish that the price is down from 1970 to January 1972. Respondents note the composite price decline to $34.46 per ton in 1971 was a greater price difference than could be attributed to the amount of the increase in railroad freight rates. In addition, while protestant reports the composite price of $33.09 per ton in January 1972, the "Iron Age" issue of March 23, 1972, reports a composite price of $34.83 per ton. Thus, instead of a steady decline, the price of scrap iron continues to fluctuate both up and down with no discernible relationship to freight rates or freight rate increases.

The spread in monthly scrap prices for No. 1 heavy melting scrap is set out in the table below for each year 1955-70. The price of scrap swings significantly from month to month within any 1 year. These month to month fluctuations, ranging as high as $8.64 per ton, bear no relationship to changes in freight rates.

Composite Scrap Steel Prices[1]

Year	Greatest difference between months	Widest spread between consecutive months
	(dollars per gross ton)	
1955	15.62	4.20
1956	19.69	8.61
1957	26.68	8.64
1958	9.40	4.79
1959	11.00	3.78
1960	11.36	5.23
1961	6.79	5.56
1962	14.16	4.44
1963	3.42	3.09
1964	9.89	3.29
1965	8.32	3.21
1966	7.20	3.42
1967	3.14	1.75
1968	8.51	2.48
1969	9.03	3.05
1970	10.09	5.59

[1]Composite averages of No. 1 heavy melting steel scrap prices at Pittsburgh, Philadelphia, and Chicago, compiled from monthly averages published by American Metal Market.

Recent weekly issues of "Iron Age" quote per ton prices on No. 1 heavy melting scrap at Pittsburgh as follows:

Issue	*Price*
	Per ton
October 21, 1972	$34 - $35
November 18, 1971	33 - 34
December 16, 1971	31 - 32
January 13, 1972	35 - 36
February 17, 1972	37 - 38

Thus, without any change in freight rates, the price declined between October and December. It came back in January and rose still further in February, after the 2.5-percent surcharge went into effect.

The question remains as to the effect of various freight rates on the movement of these materials; or, more specifically, the deterrent effect of allegedly disparate rates on scrap movement. Where integrated steel producers are concerned, the consumption and demand for scrap is related in large part to their costs of

producing the competing primary material, hot metal (liquid pig iron) from iron ore. Despite changes in the relative importance of the various types of iron and steelmaking furnaces, particularly through the introduction of the basic oxygen converter, which is a relatively new user of ferrous scrap, variations in the total scrap (home and purchased)—pig iron proportions of the total metallic charge have tended to cancel each other out. In 1971, the ratio is almost exactly at the 50-50 level which has prevailed over at least the entire post World War II period. However, protestant shows purchased scrap declined as a percentage of the total furnace charge from 21.5 percent in 1957 to 19.4 percent in 1969.

Percent of scrap consumed to total furnace charge in all types of furnaces

Year	Purchased scrap	Home scrap	Total scrap
1956	25.3	26.4	51.7
1957	21.5	27.2	48.7
1958	21.8	27.8	49.6
1959	22.6	29.1	51.7
1960	19.8	30.1	49.9
1961	19.5	30.0	49.5
1962	19.0	30.8	49.8
1963	20.2	30.5	50.7
1964	18.7	30.8	49.5
1965	19.7	30.7	50.4
1966	20.0	30.0	49.9
1967	21.5	28.0	49.4
1968	18.9	30.3	49.2
1969	19.4	30.7	50.1

Respondents rebut this showing with evidence of increased total consumption of scrap iron in steelmaking furnaces. It is apparent from the table that the percent of scrap consumed fluctuates from year to year. The percentage moved up and down during the period 1961-66 when there were no general freight rate increases, and it continued to move in both directions in the period 1967-69 when there were a succession of increases. However, the table is misleading in terms of actual movement. Total scrap consumption in 1961 came to 64,327,000 tons. In 1969, however, total scrap consumption was 94,816,000 tons. Thus, the 19.4 percent use attributed to purchased scrap in 1969, according to respondents, represents substantially more in terms of actual tonnage of scrap

iron than did the 19.5 percent use of purchased scrap shown for 1961. Moreover, the table relates to domestice consumption only and does not take into account a significant increase in exported scrap iron which has occurred in the last few years. Protestant contends respondents' presentation misses the point that home scrap generally is not bought and sold as is purchased scrap and that the upward movement in scrap consumption has occurred as a result of the higher utilization of home scrap, produced and consumed within a single steel complex without rail transportation.

The following table, submitted by respondents, shows that between 1957 and 1969 scrap iron and steel consumption actually increased in terms of steel ingots produced, from 63.3 percent to 67.2 percent. There was also an increase in scrap consumption between 1967 and 1969 in the face of the increases granted in Ex Parte No. 265, Ex Parte No. 259, and Ex Parte No. 262. Thus, respondents' table shows that scrap consumption rises and falls with steel production.

Percent iron ore, pig iron and scrap consumption is of steel ingots

DOMESTIC PRODUCTION

Year	Steel ingots	Iron ore	Percent	Pig iron	Percent	Total scrap consumption	Percent
	In thousands of net tons						
1957	112,715	115,314	102.3	80,798	71.7	73,549	65.3
1958	84,310	76,101	90.3	58,808	69.8	56,360	66.8
1959	93,446	67,509	72.2	62,178	66.5	66,062	70.7
1960	99,281	99,438	100.2	68,566	69.1	55,469	67.0
1961	98,015	79,888	81.5	66,565	67.9	64,327	65.6
1962	98,328	80,448	81.8	67,595	68.7	66,160	67.3
1963	109,261	82,330	75.4	73,715	67.5	74,621	68.3
1964	127,075	95,016	74.8	87,800	69.1	84,626	66.6
1965	131,185	97,932	74.7	88,944	67.8	90,359	68.9
1966	134,072	100,965	75.3	92,157	68.7	91,583	68.3
1967	127,213	94,280	74.1	87,271	68.7	85,361	67.1
1968	131,098	96,168	73.4	89,890	68.6	87,060	66.4
1969	141,069	99,950	74.9	93,502	66.3	94,816	67.2

Source: "FACTS" issued by Institute of Scrap Iron and Steel, Inc., page 34, 31st edition yearbook, 1970.

Exports of scrap have been increasing gradually over the years from a level of a few hundred thousand tons per year in the early

1950's to a peak of 10.6 million tons in 1970. This export demand is partly a result of expansion of electric furnace capacity in other countries. Such demand is relatively inelastic since the United States is the principal exporter of iron and steel scrap. Total tonnages of nonhome scrap collections for domestic and export consumption are up about 50 percent from the late 1950's and early 1960's to 1969 and 1970. Scrap demand is based on economic variables, mainly steel demand. This changes, and scrap prices fluctuate. These fluctuations far outweigh proposed freight rate increases.

Over the past 15 years, the rate of scrap consumption in steelmaking has been relatively constant at slightly more than 50 percent of the total metallics used in the process. The balance is mainly blast furnace hot metal produced from iron ore. With the advent of continuous casting and other processes which improve the yield of acceptable product manufactured within the steel mills, less mill (home) scrap is being generated. On the other hand, the consumption of obsolete scrap is on the increase, primarily because motor vehicles are being scrapped and reprocessed at an increasing rate.

The quantity of scrap consumed domestically has varied between 94.8 million short tons (1969) and 56.4 million short tons (1958) during the period 1955-71. Since 1960, the quantity of scrap consumed has increased by 42.6 percent or an average of 4.3 percent per year.

Domestic consumption of iron and steel scrap

Year	Thousand short tons
1946	49,484
1947	60,864
1948	64,963
1949	54,338
1950	68,901
1951	76,728
1952	69,023
1953	77,130
1954	61,354
1955	81,375
1956	80,315
1957	73,548
1958	56,359
1959	66,061
1960	66,468
1961	64,326

Domestic consumption of iron and steel scrap—Continued

Year	Thousand short tons
1962	66,159
1963	74,620
1964	84,625
1965	90,359
1966	91,583
1967	85,361
1968	87,060
1969	94,816
1970	85,188
1971 estimate	80,000

Source: U.S. Bureau of Mines.

Protestant refers to scrap consumption in terms of percentages and states that purchased scrap is losing ground. Scrap tonnages give a different picture.

Total nonhome scrap consumption

Year	Domestic	Export	Import	Total
	Thousand short tons			
1951	37,881	245	416	38,542
1952	34,184	351	153	34,688
1953	35,439	309	173	35,921
1954	23,394	1,679	239	25,312
1955	35,735	5,129	228	41,092
1956	36,845	6,340	255	43,440
1957	31,086	6,765	238	38,089
1958	23,291	2,927	332	26,550
1959	29,043	4,939	309	34,291
1960	26,095	8,039	179	34,313
1961	25,305	9,195	270	34,770
1962	25,284	5,195	264	30,743
1963	29,432	6,368	217	36,017
1964	31,831	7,881	291	40,003
1965	35,804	6,174	212	42,190
1966	36,671	5,827	407	42,905
1967	32,654	7,504	229	40,387
1968	33,587	6,565	294	40,446
1969	36,926	9,035	346	46,310
1970	39,668	10,113	302	50,083

Source: Institute of Scrap Iron and Steel yearbook.

The total of domestic purchased scrap plus exports and imports is up almost 50 percent from the late 1950's and early 1960's. Domestic purchase scrap consumption alone rose about 10 million tons during the same period.

Total scrap used by iron foundries, steel mills, and for export during the year amount to 104,106,000 short tons in 1969. Of this total scrap, home scrap was estimated to account for about 59 percent, or 61,675,000 short tons. Purchased scrap accounted for the remainder, or 42,431,000 short tons. In turn, prompt industrial scrap was estimated to be the source of about 33 percent of total purchased scrap while obsolete scrap was estimated to account for the remaining 67 percent of purchased scrap. About 8 million short tons, or 28 percent of obsolete scrap, was estimated to have come from junk automobiles. Of the three sources of scrap, i.e., home, prompt, and obsolete, the latter is the one that expands and contracts most with changes in total demand.

The following table indicates consumer stocks of scrap and pig iron for 1968 and 1969. Stocks of both decreased in 1969. Other stocks of iron and steel scrap are not easily determined. The United States has 14 to 20 million junk automobiles and another 6 to 7 million are added to this stockpile each year.

Stocks of iron and steel scrap and pig iron at major consuming industries' plants December 31

Year	Manufacturers of steel ingots and castings	Manufacturers of steel castings	Iron foundries and miscellaneous users	Total
		Thousand short tons		
Scrap stocks				
1968	6,691	346	845	7,882
1969	5,413	270	869	6,552
Pig iron stocks				
1968	2,028	22	292	2,342
1969	1,467	16	240	1,723

Source: U.S. Bureau of Mines.

The direct inputs for the steelmaking furnace include ferrous scrap, iron pellets (crude metallic iron), and either hot metal or pig iron. Nonintegrated steel producers purchase scrap and pig iron for

melting in the steelmaking furnace. Integrated steel producers supply their pig iron needs by the smelting of iron ore and iron ore pellets in a blast furnace within their own complex to produce hot metal. Hot metal is much better suited to steelmaking. It is necessary to remelt pig iron, thereby converting it back to hot metal, before it can possibly be refined into steel. The contained sensible and latent heat energy in hot metal makes it a considerably more valuable commodity than pig iron, even though it is only an intermediate product in steelmaking processes. In steelmaking, the unwanted excess carbon and silicon are oxidized out of hot metal, along with some of the iron (inevitably) and the other dissolved elements such as manganese, sulfur, and phosphorus. Inasmuch as these oxidizing reactions yield heat, which has engergy value, the yield heat is absorbed in the melting of scrap iron.

Two principal processes, which are very similar chemically, are used in the United States to convert hot metal into steel. The dominant process, basic oxygen steelmaking, is based entirely upon the heat of refining as its sole energy source; the other, open hearth steelmaking, will accept energy obtained from external fuels. There are distinct technological limits to the amount of ferrous scrap and blast furnace hot metal that can be used in steelmaking; scrap and hot metal (or melted pig iron) are interchangeable in steelmaking only in given situations. There are three important types of steelmaking furnaces used today: the electric arc furnace which uses essentially nothing but scrap, the basic oxygen furnace which uses a little as 15 percent or as much as 30 percent scrap as its source of iron, and the open hearth furnace which typically uses about 45 percent scrap, but can use all scrap.

The basic oxygen process of steelmaking has grown rapidly, at an average annual rate of 283 percent, from an output of 1,864,000 short tons in 1959 to 63,330,000 short tons in 1970. The basic oxygen furnace converts hot metal (molten pig iron) into steel. The process uses smaller amounts of scrap than the electric furnace and the open hearth furnace. Based on refining ordinary hot metal with pure oxygen, the fuel content of hot metal is sufficient to heat and melt about one-third of its weight in steel scrap. Thus, the proportion of hot metal in the basic oxygen furnace charge is typically from 69 to 75 percent, normally 71 percent in efficient installations. Since most steel mills using this process generate their own home scrap, they need to purchase little scrap in the market. However, some companies have increased their ability to use more

scrap in the basic oxygen furnace by preheating before charging into the vessel.

Output from open hearth furnaces has declined from 80,327,000 short tons in 1954 to 48,022,000 short tons in 1970. Until recently, such furnaces were the largest source of steel, but in the last 2 or 3 years the basic oxygen furnace has become more important. While the basic oxygen steelmaking is dominant for all new or replacement capacity, the older open hearths are being retired only slowly. An important reason is that the use of fuel, supplied by burner systems, for some of the energy gives the open hearth process a capacity for using a higher and more freely variable proportion of scrap. Indeed, the open hearth furnace can use as little as 29 percent scrap or as much as 100 percent. Thus, in a favorable scrap market, it is possible for a modern open hearth furnace operation to produce steel more cheaply than a basic oxygen furnace. However, operating and capital costs are high and throughput times are long. Typically, the open hearth furnace, as operated by the integrated steel companies, has used a charge that contains slightly less than 50 percent scrap. The replacement of the open hearth by the basic oxygen process has resulted primarily in lower domestic demand for scrap and in increasing availability of scrap for export. The increased availability of scrap has to some extent contributed to the growth of electric arc furnaces.

Steel output by electric furnaces has increased from 5,436,000 short tons in 1954 to 20,162,000 short tons in 1970. The average annual rate of increase in electric furnace steel output during this period has been 24.5 percent. The electric arc furnace is expected to account for an increasing percentage of raw steel produced. This furnace can use a 100-percent scrap charge, but for technological reasons usually uses about a 98-percent scrap charge, including some pig iron. About 30 percent of the scrap is home scrap, and the remainder is purchased.

Steel production and scrap consumption by type of furnace

	1970 steel production	Percent of steel produced			Percent of purchased scrap
		1960	1970	1985	used in charge
	Tons			*Estimate*	
Electric arc	20,162,000	8	15	30	98-100
Basic oxygen	63,330,000	3	45	60	15-30
Open hearth	48,022,000	90	40	10	29-100

In the long range future, it is expected that the open hearth process will disappear owing to its high capital cost per unit of productivity. In that event, the field will be dominated by electric arc steelmaking and basic oxygen steelmaking. As stated, the basic oxygen process uses a small fixed proportion of scrap, and that proportion corresponds quite closely to the amount of home scrap produced within the mill. The electric arc process is entirely independent of hot metal, and most of its net production today is based upon purchased scrap. Thus, for the future, the two dominant steelmaking processes are conceptual opposites. Where basic oxygen steelmaking is used, little or none of the iron contained in steel leaving the plant will have entered the plant as purchased scrap. In a plant based upon electric arc steelmaking, it is likely that all of the iron in steel leaving the plant will have entered the plant as purchased scrap iron.

The Institute of Scrap Iron and Steel offered expert metallurgical testimony prepared by Battelle Memorial Institute, Columbus Laboratories, to demonstrate competition between iron ore and ferrous scrap and the existence of a rate disadvantage on scrap resulting from the present rate structures. Battelle submits that in the making of steel, whether by use of iron ore or scrap iron as the primary raw material, the steelmaker is concerned with iron units in the respective inputs. The alleged competition, in essence, is based on the relative iron content which can be reduced to forms suitable for steelmaking. Thus, it concludes that freight rates on iron ore and ferrous scrap should reflect the respective available iron contents in the products.

Battelle acknowledges that since iron units in ore are oxidized and, therefore, not identical to the metallic iron units in scrap, it is necessary to consider the chemical reducing agent required to convert the iron in ore to metallic form, and thus to make the iron units in the competing products directly comparable. The appropriate reducing agent is metallurgical coal or coke, which may be distinguished in function from the coal used to melt the reduced iron to form hot metal. Thus, the equivalence formula developed by Battelle to describe the metallurgical relationship between competitive iron units in an average ore and average scrap iron is as follows:

2,000 pounds of scrap (95 percent Fe) =
3,167 pounds of iron ore (60 percent Fe)+602
pounds of coal.

In Ex Parte No. 265 and Ex Parte No. 267 we adopted the formula, as calculated by respondents, that production of 1 ton of pig iron, which would compete with 1 ton of scrap, requires 1.8 tons of iron ore (about 3,600 pounds), 0.73 tons of coke (1,460 pounds), 0.22 tons of limestone, and 0.056 tons of scrap. We concluded that while the basic rates per ton on iron ore are lower than on scrap, the total transportation charges on the commodities required to produce 1 ton of pig iron are substantially higher. Battelle considered the additional components of steelmaking employing both primary sources of metallics and concluded the impact on finished steel of transport cost for refractories, fluxes other than limestone, minor supplies, capital, labor, and utilities other than energy are identical in both types of steelmaking. In the matter of limestone, Battelle concedes the possibility that a slight transport-based differential would show higher costs for ore-based steelmaking. However, since limestone also moves by truck, and not entirely by rail, Battelle feels that element of the equation represented by the cost of transporting limestone may be ignored. We do not find this logic convincing. However, Battelle also shows a transport-based differential exists in the matter of energy coal (not reducing coal) used in scrap-based steelmaking. Thus, it concludes it is proper and technically sound to assert that the offsetting transport-based biases on limestone and energy (coal) exist in approximately similar magnitudes, with the resulting overall conclusion that all transport cost factors but those for ore, metallurgical coal (for reduction), and scrap iron approximately offset each other in the competing steelmaking processes.

According to protestant, the Battelle formula presents a fair basis for relating the competition between ore and scrap as metallic sources. Thus, iron and steel scrap and iron ore are competitors in the sense that they both yield iron units usable at a profit in the steelmaking process. The main difference between the competitive inputs is that iron ore requires reduction from oxide to metallic form prior to use; the reduction of iron ores confers equivalence with the iron found in ferrous scrap.

Battelle reduced the metallurgical formula to an equivalence reflecting the estimated share of rail movement of the various commodities: thus, 74 percent of the scrap iron and steel consumed moves by rail, 58 percent of iron ore, and 65 percent of

metallurgical coal. Again, we are not persuaded that this distinction is necessary or proper. Battelle utilized the 1-percent waybill statistics for 1966 to determine average revenue per hundredweight for each commodity: 20.6 cents for scrap, 8.2 cents for iron ore, and 14.2 cents for coal. When these revenue data are inserted into the adjusted equivalence formula, the rate equivalence fails by the amount of $1.49 per ton. Thus, Battelle concludes the rate structure is, on the average, prejudicial against the movement of iron and steel scrap, or prefers the movement of iron ore, by $1.49 per ton. On the basis of this $1.49 rate disadvantage for scrap at the 1966 level, Battelle concluded that the excess cost per net ton of raw steel made from purchased scrap is $4.21. In terms of relative importance, it is generally estimated that the cost to manufacture a net ton of raw steel is approximately $69 to $74 per ton of ingot. Thus, on this basis, the impact of the railroad rate differentiation amounts to approximately 6 percent of total costs.

In rebuttal, respondents apply the basic Battelle formula to demonstrate that the proposed percentage increases actually favor scrap iron in relation to hot metal in terms of total transportation costs. As stated, the Battelle formula equates 2,000 pounds of ferrous scrap with 3,167 pounds of iron ore plus 602 pounds of coal. The latter are stated as the components required to produce 1 ton of hot metal, or molten pig iron. The application of the proposed 4-percent increase to 2,000 pounds (1 net ton) of scrap iron would mean an increase of 20.92 cents. The 4-percent increases applied to 3,167 pounds of iron ore (average rate $3.29 per gross ton) and 602 pounds of coal (average rate $3.45 per net ton) totals 22.8 cents.

Effect of Percentage Increase on Scrap Iron and Components of Hot Metal

2,000 pounds of scrap iron - Average rate $5.86 gross ton
Average rate $5.23 net ton
$5.23 net ton x 1 ton = $5.23

3, 167 pounds of iron ore - Average rate $3.29 gross ton
(1.5835 net tons) Average rate $2.94 net ton
$2.94 net ton x 1.5835 net tons = $4.655

Effect of percentage increase on scrap iron and components of hot metal—Continued

602 pounds of metallurgical coal - Average rate $3.45 net ton
(0.301 net tons)
$3.45 x 0.301 = $1.04

Equivalents

Scrap iron	Iron ore 3,167 pounds
2,000 pounds	Metallurgical coal 602 pounds
	$4.66 iron ore
	1.04 met. coal
$5.23	$5.70
0.04	0.04
Effect 20.92 cents	22.80 cents

In ores, the iron content is limited by nature to a maximum of 73 percent and the improvement of iron content above that level yields an artificial product. Many ores, however, are found naturally with far lower iron content such that agglomerating or beneficiating processes are common even where the end result is a product with less than 73-percent iron content. Thus, a low-grade ore improved by any one of many possible processes to a level of 60-percent or 65-percent iron is still iron ore although most likely in pellet form (iron ore pellets), whereas an ore improved by prereduction, whether by blast furnace smelting or otherwise, to a level of 90 to 95 percent iron is no longer considered an ore but rather an ore product, generally referred to as crude metallic iron or iron pellets. Iron ore and iron ore pellets serve exclusively as inputs for the blast furnace and, when processed in conjunction with coke and limestone, will produce hot metal or pig iron. The only commodities sufficiently pure in iron content to serve as direct inputs for steelmaking furnaces are ferrous scrap, crude metallic iron or iron pellets, and pig iron or hot metal.

Thus, the only transportable commodities which are directly competitive with ferrous scrap as inputs for steelmaking furnaces are pig iron and crude metallic iron or iron pellets. Respondents have proposed identical increases on these commodities. On the basis of the detailed evidence contained in this record, and, in particular, in view of the requisite intervening reduction and smelting processes, including the transportation and application of substantial quantities of coke as a reducing agent and limestone as a fluxing agent, shown

necessary to transform iron ore to a competing product, we are compelled to affirm our finding in Ex Parte No. 265 and Ex Parte No. 267 that ferrous scrap and iron ore do not specifically and directly compete to the extent that they require similar rate treatment.

Respondents note that important differences exist in the transportation service performed by the railroads in connection with shipments of ferrous scrap and iron ore, including differences which bear on the relative costs of moving these commodities such as average weight per car, average length of haul, number of carloads per shipment, and regularity of movement. Respondents developed comparisons of such factors for iron and steel scrap and iron ore from Statement TD-1, Caroload Waybill Statistics—1969. In each instance the transportation characteristics of iron ore are superior. Thus the average weight per car from iron ore within official territory is shown to be 77.5 tons compared to only 55.5 tons for ferrous scrap. Similarly, the average length of haul for iron ore within official territory is 188 miles, compared to only 106 miles for ferrous scrap. Typically, iron ore is handled in large volumes and frequently in trainload quantities of 100 or more cars; iron or steel scrap, which may be originated or terminated in multiple-car cuts, is frequently moved at the rate of a single car per day. The waybill data for these two commodities follow:

	Sample size (waybills)	Carloads	Carloads per waybill
		Iron or steel scrap	
U.S. to U.S.	994	5,270	5.3
Official territory	712	3,625	5.1
		Iron ore	
U.S. to U.S.	266	19,150	72.0
Official territory	86	4,550	53.0

Respondents further contend that a comparison of the freight rates should take into consideration the costs involved in transportation of iron ore prior to the rail move. For example, no account is taken by protestant of the costs of the water movement which precedes the rail movement from Lake Erie to North Atlantic ports to the Pittsburgh district.

In regard to the maximum of 22 cents per gross ton proposed on iron ore, respondents note the present average rate on scrap iron

and steel within the East (excluding the 2.5-percent surcharge) is $5.86 per gross ton. A 4-percent increase means an average increase of 23.44 cents per gross ton on scrap iron. A 22-cent holddown on scrap would, therefore, affect the anticipated revenues on all scrap iron moving at the average rate or above. On the other hand, the average rate on iron ore within official territory is $3.29 per gross ton and a 22 cents per gross ton maximum is of little consequence since the average increase on iron ore will be only 13.16 cents per gross ton.

Respondents estimate the proposed maximum will apply to less than 5 percent of the total iron ore terminations (51.9 million tons in 1970) in the East. The maximum would not come into play until the iron ore rate reaches $5.62 per gross ton, the level at which 4 percent begins to exceed 22 cents. The great preponderance of iron ore movements in the East are ex-lake volume shipments to the furnace points in the Pittsburgh, Youngstown, Wheeling, and Portsmouth area. These rates generally range from $2.60 per gross ton to $3.93 per gross ton. Rates on significant movements of import ore through Philadelphia, Pa., Baltimore, Md., and Fairless, Pa., to consuming points in eastern territory generally range at levels substantially below $5.62 per gross ton and the 22 cents maximum would not apply. While there are some single-car rates on North Atlantic import and ex-lake iron ore in excess of $5.62 per gross ton they have no significant competitive impact and move relatively little tonnage.

Generally, therefore, the 22 cents maximum permits the full 4-percent increase to apply on iron ore traffic except the relatively small amount of long-haul all-rail movements. As a matter of fact, the only significant movements which would be affected within the East are the movements from Benson Mines, N.Y., and from eastern Canada to the Pittsburgh area. The rates from New York origins range from $6.05 to $6.26 per gross ton at the Ex Parte No. 267 level. Rates from Canadian origins range from $6.91 to $8.64 per gross ton. On this traffic, the 22 cents per gross ton holddown will apply and reduce the increase below 4 percent. From some major Canadian origins the increase will be no more than the presently effective 2.5-percent surcharge. For example, from Dane, Ontario, to Pittsburgh the $8.64 per gross ton rate will be increased by 2.5 percent to $8.86 per gross ton.

As stated, we are convinced that the only transportable commodities which are directly competitive with ferrous scrap as inputs for steelmaking furnaces ore pig iron and crude metallic iron

or iron pellets; and we find warranted the identical increases proposed on these commodities.

We see no justification for requiring that increases on ferrous scrap be made subject to the maximum per ton limitation applicable on iron ore. Ferrous scrap, as found above, does not directly compete with iron ore in the steelmaking process and their transportation characteristics—including differences in average weight, length of haul, size of shipment, regularity of movement, and general distribution—are materially different.

Finally, we conclude that the level of prices for ferrous scrap rises and falls with steel production, with no discernible relationship to freight rates and freight rate increases, and that the increase authorized herein will not inhibit the movement of ferrous refuse, such as abandoned automobiles and refrigerators. Accordingly, we foresee no adverse effect on the quality of the human environment resulting from our approval. For the same reason, we believe that a limitation on the increase for purposes of encouraging increased movement of ferrous scrap would be unsuccessful and would serve only to deprive the railroads of needed additional revenue. The situation here differs materially from that found to exist with respect to secondary materials generally. See discussion above.

* * * * *

Fly ash.—The increase proposed on fly ash is 6 percent. Fly ash is an extremely low value waste byproduct which results from the combustion of coal. It becomes commercially available because it is collected by electric utilities to prevent air pollution. Less than 10 percent of the fly ash collected is disposed of commerically. Protestant, Chicago Fly Ash Company, ships the commodity for use as a pozzolan in the contruction of concrete dams in the West.

Fly ash is shipped long distances in both rail and privately owned covered hopper cars, is competitive with natural pozzolans, consisting mainly of shale and volcanic ash, available locally throughout the West and is highly sensitive to freight rates. The avèrage f.o.b. price on protestant's rail shipments is $1.50 per ton; rail rates on its two principal movements to western dam sites are $14.37 and $15 per ton. Application of the 6-percent increase to these rates will result in increases of 86 cents and 90 cents per ton, respectively. Protestant further contends that if it is unable to market fly ash this will create a waste disposal problem which will hamper efforts to clean up the enviroment.

Respondents assert that the low value of fly ash is recognized by the fact that the rate levels have been and will remain at a low level. They also suggest that the disposal problem must be solved by the electric utilities which produce the fly ash.

The fly ash market has been expanding at a rate of 75 percent each year between 1966 and 1970. However, utilization of fly ash in this country lags behind European utilization which runs as high as 50 percent of production. Increased utilization in this country may be largely dependent on the production of higher quality ash. For example float ash, a variety of fly ash, is lighter in weight with a more uniform particule size, coarser than regular fly ash, high in silica and aluminum content and low in iron. Because of these properties, float ash has been recognized as a good refractory raw material and sells in one European country for $80 per ton.

The proposed increases on fly ash would amount in some instances to 60 percent of the f.o.b. price. In previous general increase proceedings, we have accorded some relief to fly ash shippers. While we agree with respondents' contentions that they should not be obliged to shoulder the responsibility for the production and disposal of this waste product, and that fly ash should bear a proportionate share of respondents revenue needs, we, nevertheless, believe that the proposed increases are excessive

in light of the record herein, including environmental considerations. Accordingly, we find that the proposed increases will not be just and reasonable to the extent that they exceed 3 percent. That limitation, we believe, will encourage increased movement of fly ash by rail.

* * * * *

Petroleum refinery wastes and waste sulfide.—On chemical or petroleum waste, respondents propose an increase of 4 percent generally, and 3 percent to or within the South. On caustic soda waste, spent caustic soda, and spent caustic soda solution, the proposed increase is 3 percent.

The Merichem Company, which opposes the increases, purchases petroleum refinery wastes from refineries located throughout the United States and Canada. It ships these wastes to Houston, Tex., for recovery of small amounts of usable chemicals, including waste sulfide, cresylic acids, and phenol. The recoverable content of petroleum refinery wastes is less than 17 percent of gross weight. After removing the toxic pollutants, the residue is disposed of in a manner consistent with pollution control standards. Prior to Merichem's operations, refinery wastes were disposed of by dumping in the ocean and deep land wells resulting in a serious pollution of surface and subsurface waters. Merichem does not oppose an increase on cresylic acids and phenol, but does oppose the imposition of any increase on inbound petroleum refinery wastes and outbound waste sulfide solution.

Protestant contends that these low-valued waste commodities cannot sustain the proposed increases, that the increases will cause further diversion to barge movements, and that they are not in the public interest since they will result in a curtailment of its waste recycling service. To transport these waste materials, Merichem operates a fleet of 258 leased tank cars and 5 leased tank barges with a combined capacity of 7,900 tons. Its largest operating expense, transportation, represents over 30 percent of its total costs. Present freight charges on petroleum waste exceed its value. If the increases are granted, Merichem proposes to divert traffic to barge where possible and to discontinue certain movements from landlocked refineries. Allegedly, as a result of increases granted in Ex Parte Nos.

265 and 267, Merichem began two new barge movements and abandoned movements from 11 refineries.

Protestant continues to receive wastes from over 100 refineries in 21 States and Canada. It recently supported the establishment of a rate of 80 cents per hundredweight from Amoco, Va., to Houston, a distance of 1,431 miles. In contrast, the present rate from American Oil's refinery at Sugar Creek, Mo., a representative midwestern movement, is only 48 cents per hundredweight. Since it imports wastes for long distances from Canada, Pennsylvania, or Virginia, there may be other reasons than freight rates for not serving other plants within that radius. For example, the amount of useful chemicals in any particular batch of petroleum wastes depends on the type of crude processed by the refinery, the processes and the chemicals employed. Thus, the use of wastes of a particular refinery may largely depend on the amount of recoverable products in the waste and the selling price of such recoverable products. It is also apparent that if Merichem pays the freight and utilizes leased tank cars it is to its advantage to obtain petroleum wastes as close to Houston as possible where the freight and tank car turnaround times will be minimized. Moreover, the allegation that the increases will result in a diversion from rail to barge is contradicted by protestant's admitted increase in the use of rail service from 1969 through 1971. Finally, when barges are available some traffic may be diverted regardless of the railroad rate level.

Protestant's contentions that refineries depending on rail movement may again resort to dumping wastes into watersheds is open to question. Refinery operators are cognizant of the need to control pollution. Moreover, there are a number of alternatives available to refiners, including direct sale to papermills or to Merichem's competitors, and use of fluid bed incineration, a nonpolluting method of waste disposal. Additionally, in the fluid catalytic cracking process the spent caustic waste solution may be stripped of hydrogen sulfide. Furthermore, petroleum products may be treated so as to remove the sulphur directly rather than through caustic washing. The sulphur so recovered is in a salable form and there is no creation of caustic petroleum refinery waste. The trend in the industry is toward this type of process.

In Ex Parte No. 267, we limited the proposed increases on petroleum waste products to 8 percent giving due consideration to environmental matters. In proposing the increases under consideration, respondents appear to have taken into account the transportation characteristics of these commodities, the necessity for

establishing the increases at a level which would facilitate the movement of this traffic while providing some measure of contribution to their overall revenue needs and the competitive situation, including possible diversion of the traffic to barge movements especially to or within the South. Accordingly, we find that the proposed increases will be just and reasonable and otherwise lawful.

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Ultimate Conclusions and Findings

Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Upon consideration of the entire record in these proceedings, we conclude and find:

1. That respondents are in need of additional revenue from their interstate freight rates and charges to offset recently incurred increased operating costs and to provide an improved level of earnings. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the increased interstate freight rates and charges proposed by respondents in this proceeding, subject to the limitations and exceptions set forth below, are permitted to be put into effect;

2. That in absence of the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them under honest, economical, and efficient management to provide adequate and efficient railway transportation services consistent with the public interest and the national transportation policy;

3. That the surcharge tariff No. X-281, as amended, was just, reasonable, and otherwise lawful during the limited period of its applicability;

4. That under the selective increase tariff No. X-281-A freight rates and charges may be increased except as noted in this report. For convenience, the principal exceptions are as follows:

(1) Intraterritorial traffic within the East—not more than 6 percent.
(2) Intraterritorial traffic within the South—not more than 4 percent.

(3) Intraterritorial traffic within the West—not more than 5 percent.
(4) Interterritorial traffic from and to all territories—not more than 6 percent.
(5) Lighterage service at New York Harbor—no increase.
(6) Mechanical protective service and detention charges for cars used therewith—no increase.
(7) Secondary materials (specified) not to exceed 3 percent.
(8) Copper bars and billets, rough cast—not to exceed 3 percent within the East.
(9) Bituminous coal—not to exceed 5 percent, maximum 30 cents per ton from East or South to Transcontinental Freight Bureau territory, or from West to East; and as to unit-train movements within the East and to or within the South—no more than 15 cents per ton.
(10) Petroleum and coal coke, lignite, and petroleum, coal and coke briquettes—not to exceed increases authorized on bituminous coal.
(11) Fluorocarbons—not to exceed 3 percent.
(12) Salt, in packages—no increase within the East or from the East and West to the South.
(13) Fly ash—not to exceed 3 percent.
(14) Processed fruits and vegetables—not more than 4 cents per hundredweight.
(15) Fresh fruits and vegetables, including citrus pomace, potatoes, and onions—not to exceed 4 percent, maximum 4 cents per hundredweight.
(16) Walnuts, shelled or unshelled—not to exceed 3 percent, maximum 3 cents per hundredweight.
(17) Wine—not to exceed 4 percent, maximum 4 cents per hundredweight.
(18) Sugar beets and sugar cane—not to exceed 3 percent.
(19) Beet and cane sugar, corn syrup and corn sugar—no more than 3 cents per hundredweight.
(20) Limerock and bagasse—not to exceed 4 percent.
(21) Grain and grain products—not to exceed 3 percent and, in the case of prepared flour mixes, subject to a maximum of 3 cents per hundredweight. Tariffs publishing authorized increases must observe a 1/2-cent progression.
(22) Malt liquors—not to exceed 4 percent, maximum 4 cents per hundredweight.
(23) Animal and poultry feed—not to exceed 3 percent.
(24) Fertilizer—not to exceed 3 percent but, in the case of phosphate fertilizer, no increase.
(25) Millwork—not to exceed 4 percent, maximum 4 cents per hundredweight.
(26) Woodpulp—no increase.
(27) Pulpwood and woodchips—interterritorial traffic from and to all territories—not to exceed 5 percent. Proposed minimum charges found not justified.
(28) Newsprint—not to exceed 5 percent to and within mountain Pacific territory and, on movements within Southwestern Freight Bureau territory or from that territory to the South, no increase.
(29) Chemicals and allied products—not to exceed 3 percent on acyclic organic ethers and propylene oxide.

5. That the increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by major districts, not in excess of that

required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service;

6. That the increased freight rates and charges authorized herein will have no undue adverse effect on the movement of traffic by railway or upon the environment, and are consistent with the Price Stabilization Program;

Accordingly, orders will be entered, (1) requiring the cancellation of the schedules under investigation herein found not justified without prejudice to the establishment or maintenance of schedules in conformity with the findings herein, and (2) modifying all our outstanding orders to the extent necessary to permit the maintenance of the increased freight rates and charges herein authorized, and granting relief from the provisions of section 4 of the act and our tariff publishing rules as may be necessary, including authority to publish and file tariff changes on not less than 15 days' notice as to commodities not moving in the recycling process, and not less than 35 days' notice in the case of commodities being transported for purposes of recycling.

COMMISSIONERS TUGGLE and HARDIN concur in the result.

COMMISSIONER BROWN, concurring in part:

While I am in general agreement with the majority as to the increases authorized in the report, I am of the opinion that we should not approve any of the increases requested for recyclable commodities. In reaching this conclusion, I have balanced the revenue needs of the rail carriers against the effect of such increases on the quality of the human environment. On the one hand, and with due consideration of the rail contentions respecting need for additional revenues, it is my considered opinion that denying the rail request for increases on recyclable commodities will, on the whole, have very little effect on overall rail revenues. On the other hand, the National Environmental Policy Act of 1969 (NEPA) was enacted into law by the Congress in order to meet a long-overdue need and strong public pressure for affirmative national action to improve the quality of our deteriorating environment. Further, it is evident that both the Executive and Judicial branches of our Government are vitally concerned with environmental problems. Thus the administrative agencies charged with regulatory responsibilities cannot in good conscience ignore this clear mandate for action. Consequently, I am of the opinion that in its treatment of recyclable commodities moving in interstate commerce, the

majority, while paying tribute to the environmental needs and the provisions of the NEPA fails to effectively deal with the environmental issue posed in this case. In my view, no better way can be found to deal with this issue than to deny increases on these commodities and thus remove any possible risk that further increased transportation charges may retard the movement and free flow of these articles in interstate commerce. To me this course of action appears to best serve the public interest.

COMMISSIONER DEASON, dissenting in part:

As a matter of policy, I dissent to that portion of the report which grants increases on selected recyclable materials. It is my view that, all things considered, the Commission should grant no further increases on recyclable materials at this time.

* * * * *

ENVIRONMENTAL IMPACT STATEMENT

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

Summary

1. The above-entitled proceeding involves an administrative action.

2. For purposes of this draft environmental impact statement, the proposed action is the possible approval or disapproval by the Interstate Commerce Commission of selected increase proposals for commodity groupings to replace the 2 1/2-percent surcharge recently allowed to become effective on a temporary basis, to be applied by the railroads in rendering service throughout the United States.

3. As an emergency interim measure to meet a critical need for additional revenue that the railroads have demonstrated, the imposition of the surcharge published to become effective on February 5, 1972, and to expire not later than June 5, 1972, as required by the order of the Interstate Commerce Commission, approved February 1, 1972, will have no significant adverse effect on the quality of the human environment within the meaning of the Environmental Policy Act of 1969.

However, by its order the Commission directed the railroads to update their tariffs to reflect rate increases previously approved not later than June 5, 1972. The railroads, on February 28, 1972, filed a proposal to increase their freight charges on a selective basis. While the Commission has made it quite clear that the surcharge now in effect will expire by operation of law no later than June 5, 1972, and thus cannot actually become a permanent part of the railroads' rate structure, nevertheless, for the purpose of analyzing its impact upon environment, and for that purpose only, we shall treat it arguendo as though it were not an interim, but a permanent increase. Under the assumed condition, if the Commission were to approve the railroads' actions by report and order entered at the conclusion of an investigation herein, such action would have only limited, if any, impact upon the environment, as more fully set forth in the accompanying draft environmental impact statement.

4. The alternatives to the incorporation of the surcharge as a permanent part of the railroads' rate structure include the selective application of authorized increases, to individual rates, the imposition of so-called holddowns or the disallowance altogether of any rate increase not previously approved by the Commission.

5. This draft environmental impact statement will be served upon all parties of record herein and upon those additional persons identified in the order of Chairman Stafford approving its service, all of whom are requested to offer comments.

6. This draft environmental impact statement will be served on March 6, 1972.

The Interstate Commerce Commission has permitted the Nation's railroads, effective February 5, 1972, to impose a 2 1/2-percent surcharge on existing rates (with specified exceptions and conditions) for an interim period no longer than 4 months, ending June 5, 1972. On February 28, 1972, the railroads submitted a proposal to increase their rates selectively, and sought permission to file updated tariffs seeking a "general increase in freight charges on a selective basis." The active investigation was held in abeyance until receipt of a request by the carrier respondents for permission to file the revised tariffs indicated above. Upon consideration of the evidence and statements presented to date in Ex Parte No. 281, *Increased Freight Rates and*

Charges, 1972, 340 I.C.C. 358, the following proposed draft environmental impact statement is made, in compliance with section 102(2)(C) of the National Environmental Policy Act (NEPA), concerning the possible impact on the environment of the Commission's approval by report and order at the conclusion of its investigation of the incorporation of the surcharge (or the rail substitute therefor) into the schedules of freight rates and charges expected to be filed by the railroads on or before June 5, 1972. This statement is made primarily to point out the issues, and to assist the parties, as well as governmental agencies concerned to present evidence and arguments in the on-going investigation proceeding and otherwise to elicit their comments.

The service of this statement in no way concedes the applicability of NEPA requirements at the suspension stage, that is, when the Commission decides whether to suspend and/or investigate a rate filing (which is all so far done in Ex Parte No. 281), or when rate changes occur by operation of law without suspension or investigation. *Port of New York Authority* v. *United States*, F. 2d , Dockets 71-1769 and 71-1770 (2d Cir. Nov. 9, 1971).

1. *The environmental impact of the proposed action.*—The imposition of, or failure to impose, a surcharge of 2.5 percent as a permanent part of the railroad rates applicable on freight services might have some impact on the environment; however, based on the varying predictions of the parties in their statements filed to date, it is unclear what the effect would be. Thus, Chairman Russell E. Train of the Council on Environmental Quality (CEQ) has stated to the Chairman of this Commission that across-the-board percentage increases widen alleged price biases against secondary materials and that they raise the costs of doing business which allegedly can hinder the salvage and reclamation industry. In their joint protest to the proposed surcharge the Students Challenging Regulatory Agency Procedures (SCRAP), The Environmental Defense Fund, the National Parks and Conservation Association, and The Izaak Walton League of America contended that any across-the-board increase in freight rates of recyclable materials would have adverse effects on the movement of such environmentally desirable traffic.

On the other hand, an environmental statement (V.S. No. 37) submitted by the railroad respondents as a result of the Commission's requirement (340 I.C.C. at 362) maintains that the surcharge can have no adverse effect upon the environment, and that any environmental impact will come only as the result of a deterioration in railroad service due to lack of funds if the surcharge had not been permitted to go into effect.

It is impossible at this point in the investigation to assess with any certainty the environmental impact of assessment of, or failure to assess, a surcharge on various recyclable materials. The parties are called upon to submit additional factual data with regard to this issue.

2. *Any adverse environmental effects which cannot be avoided should the proposal be implemented.*—Since the surcharge, if a part of the permanent rail rate structure, might have some adverse effect on the movement of the recyclable materials, the effect of implementing the surcharge could possibly be to discourage the movement of such traffic. For example, the statement of the National Association of Secondary Material Industries, Inc. (V.S. No. 98), states that the price of mixed paper stock was $11 per ton in 1966 but declined to $7.50 per ton in 1971, and that, except in the southern territory, rail rates for movements of 150 miles or more were 37-plus cents per hundred pounds of waste paper ($7.40 per short ton).

To look at another commodity as an example, based on the available information, the value of the scrap iron and steel increased by about 60 percent between 1967-70, and the price fluctuation for that commodity in a single month was more than $4 per ton. It would seem that the profits of scrap iron dealers are much more influenced by prospective price changes than the incremental freight rate of 2.5 percent which averages out at an increase of about 12 cents per ton.

We note that none of the parties undertook the task, in statements filed thus far, of estimating comparatively the specific effect of the surcharge on the demands for recyclable materials and the commodities with which they compete. The parties should address themselves to the question of whether the demand for scrap iron or waste paper and textiles would be substantially affected by an increase in price of about 12 cents per ton, taking into consideration the percentage increases that would be applied to competitive commodities.

3. *Alternatives to the proposed action.*—The railroad industry's need for additional revenues is well known. The alternatives to the proposed action thus appear to lie in a subsidy for the salvage and reclamination industry or a holddown on rate increases for recyclable materials. The other alternative, denial of any increases, could lead to a disruption in rail service, especially in connection with those carriers which are in financial difficulties. A subsidy, to be paid by interested communities or perhaps collected from the primary materials producers in the form of a tax, is beyond the jurisdiction of this Commission. Accordingly, only a partial or full holddown in the rate increase for recyclable materials can be considered in this or any similar proceeding, unless firm commitment for such subsidy is made part of the record. It should also be pointed out that we do not know whether the railroads intend to permanently increase the charges on secondary materials.

A "holddown" is the granting of something less than the proposed rate increase. This Commission in the past has used the device of a holddown to achieve a desirable result. See, *e.g.*, Ex Parte Nos. 265 and 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 209 (1971). The use of such a device, however, is not free from objections.

First, the primary mandate of this Commission is the maintaining of an efficient and economical transportation system for the commerce of the Nation. The railroads have argued that the NEPA does not require the carriers to subsidize the recycling of secondary materials, and that markedly depressed rates on some commodities thrust a subsidy burden on other traffic. Yet it seems that NEPA consititutes sufficient authority for particular inquiry into the transportation of waste materials for recycling or reuse. See, Ex Parte No. MC-85, *Transportation of "Waste" Products for Reuse*, 114 M.C.C. 92, 93 (1971), wherein the Commission declared its intention to take positive and concrete action to support and encourage antipollution programs. Nevertheless, the low rate of return and working capital level of the railroads are well known and, in order to warrant special treatment for a recyclable material, the Commission must be given facts showing substantially the entire economic picture of the salvage and reclamation industry concerned. Unduly depressed rates might well be counterproductive by burdening existing traffic, including certain volume traffic, in recyclable materials now moving with relative ease under established commercial relations.

Secondly, the dichotomy between rates based on cost of service and those based on other considerations has been well recognized. A "holddown" is not ordinarily justifiable under cost-of-service theory of ratemaking and so must be classed under a different approach. The Commission has been severely criticized in the past by many

for using rate bases other than cost of service, as being discriminatory. Although it will continue to grant holddowns where justified by the facts, and where costs of the movement are met, it is up to the parties to submit concrete data to show that such treatment is warranted. The showing may include, for example, the costs of various grades of recyclable materials to dealers; their transportation costs to points of consumption; the market value of such materials at points of consumption; the rate of return for the reclaiming and salvage industries seeking holddowns; and information concerning the relationship of volume movement of such recyclable materials to the total volume of all freight moved by rail and comparison of rail revenues (both before and after imposition of the surcharge) from recyclable materials to total rail revenues, et cetera.

The Commission will take the initiative in giving consideration to environmental values in the proceeding but it must base its decision on facts. The evidence of record at the present time is wholly insufficient to support a holddown for scrap iron and steel. As metioned above, it taxes credulity to believe that the movement of an item may be greatly impeded by an increase in freight rate of 12 cents per ton when the specualtive price rise of that item may be as much as $4.25 per ton in a single month, and over a 3-year period the value of that item has risen about $16 per ton. Perhaps the parties can suggest a proper perspective for viewing the need for a holddown concerning the scrap iron and steel industry. It does not appear to be too much to ask in a proceeding of this magnitude that such be done.

4. *The relationship between local short-term use of man's environment and enhancement of long-term productivity.*—The short-term use of man's environment involved in this proceeding appears twofold. First, to the extent waste materials are recycled, they take the place of primary raw materials in satisfying consumer demand. For example, 1 ton of reprocessed waste paper conserves 17 trees. Ex Parte Nos. 265 and 267, *supra*, 339 I.C.C. at 204. Secondly, the consumption of the waste materials is a means of disposal and prevents littering and pollution. The long-term productivity of our land and other natural resources would be clearly enhanced by recycling and reusing such waste materials.

5. *Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.*—At this point, no irreversible and irretrievable commitments of resource here appear to be involved.

SUMMARY

The surcharge, if it were designed to be incorporated into the permanent rate structure of the railroad respondents, might then have an impact on the environment because it could be a deterrent to the transportation of certain waste materials for recycling and reuse. However, present evidence of record is completely inadequate for the Commission t ake a determination as to what commodities, if any, warrant special treatment. The ommission requests the parties and other interested persons to assist it in properly discharging its duties under the NEPA by furnishing useful economic data on which the environmental decision in this proceeding must be based and otherwise to comment on this statement.

The opinions and conclusions set forth in this impact statement are tentative and based only on that evidence already available. It is recognized that more evidence is needed before the environmental impact can be definitively measured.

This impact statement will accompany the case through the administrative process, including the processing of the selective increase proposal filed February 28, 1972, and is subject to total or partial revision depending on the conclusions ultimately reached by the Commission.

APPENDIX D

Summary of facts and issues relating to the environmental effects of the proposed increases

I. STATEMENTS RELATING TO THE SURCHARGE

Initial statements relating to the environmental questions embraced in the temporary 2.5-percent surcharge which became effective on February 5, 1972, were filed separately by the petitioning railroads, the Institute of Scrap Iron & Steel, Inc., S.C.R.A.P., and the National Association of Secondary Material Industries, Inc., and jointly by S.C.R.A.P., the Environmental Defense Fund, the National Parks and Conservation Association, and the Isaac Walton League of America. The railroads submitted reply statements as to these issues. The positions thus taken by the parties will be reviewed and analyzed at this stage of our report in order that we might accord more complete and final explication to the admittedly provisional environmental conclusions earlier expressed in the draft environmental impact statement issued in the proceeding on March 1, 1972, and to afford a more logical base upon which to proceed to a consideration of the selective increases now proposed.

A. INITIAL STATEMENTS

The railroads.—In their statement filed January 3, 1972, the railroad petitioners represent that there will be no adverse effect upon the environment by a grant of the proposed rate increases; that there is no practical alternative to the proposed action; and that any environmental impact will come only as a result of deterioration in rail service due to a lack of needed funds, if the proposed 2.5-percent surcharge is not allowed to become effective. They believe that any possible adverse environmental impact in the form of reduced movements of commodities by rail will ensue only if the railroads fail to provide adequate and efficient service. They are concerned with environmental problems, but aver that the problem of efficient rail service is at least as pressing.

The railroads forecast that certain shippers will contend that an overall percentage increase in rail freight rates will adversely affect the movement of their commodities, and that this in turn will impede the recycling of their materials. In anticipation of arguments of the scrap iron industry (a) that any increases in scrap iron rates must be held down to those applied on iron ore, and (b) that the failure to do so will aeversely affect scrap iron in the marketplace, the railroads contend that there is no connection between scrap prices and iron ore prices nor between scrap prices and freight rate levels. They point out that in Ex Parte No. 256, the scrap iron industry had complained that the low price of scrap and the allegedly high rail rates were contributing to the marginal profits of the industry; and that in Ex Parte No. 259, it was alleged that higher rates on scrap iron would dry up the movement. The railroads aver that since Ex Parte No. 259, and despite successive increases in railroad rates, the price of scrap iron prices rose from $27.64 a ton in 1967 to $43.50 a ton in 1970, without any comparable price change in iron ore and pig iron. They conclude that the use and price of scrap iron are wholly unaffected by the current proposal. Referring to this Commission's finding in Ex Parte No. 267, that an increase of 15 percent would

increase the average scrap iron rate by 76 cents a ton, the railroads argue that, on the same basis, the 2.5-percent surcharge would mean an increase of about 14 cents per ton on a commodity the price of which can regularly fluctuate by more than $4 a month.

The railroads maintain that they have already made a substantial contribution to the cause of ecology in the form of the holddowns prescribed by this Commission in Ex Parte No. 267 as to scrap iron, fly ash, petroleum wastes, nonferrous scrap, and textile and paper scrap. These holddowns, they point out, were expressly prescribed as a matter of judgment based on environmental considerations. The railroads note that the total volume of waste and scrap materials increased by 57,553 carloads between 1968 and 1969. They state that when the rail movements of these commodities increase over a period of years in the face of successive freight rate increases, it is obvious that the freight rate level has little to do with whether or not the commodity moves by rail or moves at all.

Institute of Scrap Iron & Steel, Inc.—The Institute asserts that the railroads have shown contempt for the quality of our human environment, which contempt should not be permitted to continue; and that this Commission should order the holddown on iron and steel scrap required by commercial necessity and, as a consequence, the future ecology of this Nation. It maintains that scrap iron and iron ore are competitive and that the introduction of a single percentage surcharge on the basic rates, which discriminate against the movement of scrap iron, is to continue the history of ever-rising rate prejudice. It contends that experts have shown that air pollution is lower with scrap-based steelmaking; and that the removal of unsightly scrap metal not only removes that source of land pollution but also preserves our limited natural resources, namely, the virgin metallics. The Institute avers that no increase should be permitted on iron and steel scrap until the environmental consequences of such action have been fully developed.

In a supplemental statement, the Institute questions the qualifications of the witnesses for the railroads. It states that none of these witnesses is a metallurgist or ecologist; and that such witnesses are, therefore, not qualified to testify as to the environmental effects of the proposed freight rate increase. It also avers that the statement of the railroads does not comply with the requirements of the NEPA in the matter of environmental impact.

The Institute contends that the relative prices of scrap iron and iron ore (which it deems to be competitive metallics) at any given instance are of significance to the steelmaker and that these prices incorporate the costs of service; and that any artificial distortion in the cost factors at any price level resulting from such factors as discriminatory freight rates, is incorporated into the final buying decision by the steel mill. The Institute submits that whether the price of scrap iron is $18 a ton or $48 a ton, that commodity scrap iron is at a disadvantage to iron ore, so long as provable discrimination is found to exist in the basic rates. The Institute also contends that the carriers will not lose any money as a result of holddowns because they do not now enjoy the traffic at issue.

Students Challenging Regulatory Agency Procedures (S.C.R.A.P.).—S.C.R.A.P. is an unincorporated association formed for the primary purpose of investigating the transportation freight rate structure of the railroads of the United States and its impact upon the Nation's environment, with a view to enhancing for its members, and for all citizens, the quality of the environment through a change in the said freight rate

structure. S.C.R.A.P. contends that no surcharge request should be entertained by this Commission until the railroads have updated their present tariffs to the point of eliminating needless public confusion and that no surcharge request should be granted on only 5 days' notice to the public. It asserts that to approve an interim freight surcharge prior to a hearing on the merits of the application would violate constitutional due process and preclude S.C.R.A.P. from properly advocating its environmental interest; that it (S.C.R.A.P.) must be afforded an opportunity to be heard by this Commission and by the courts before any irrevocable disposition of its interest is effected; and that any refund provision which may be embraced in an order of this Commission approving a temporary surcharge will not protect S.C.R.A.P.'s interest in preventing irrevocable harm to the environment.

S.C.R.A.P. takes the position that this Commission should not grant any interim rail freight surcharge until the environmental impact of such an action is adequately considered and this Commission issues an environmental impact statement. It concludes that any across-the-board increase in the rail freight rates would have immediate and adverse effects on the movement of recyclable materials such as paper and scrap, used glass containers, petroleum wastes, and scrap iron and steel.

National Association of Secondary Material Industries, Inc. (NASMI).—NASMI contends that the movement of nonferrous metal scrap, textile waste, paper waste or scrap, rubber or plastic scrap or waste would be adversely affected, to the detriment of the environment, by a freight rate increase and should be exempt from any emergency surcharge. It represents that the secondary material industry has developed a vast collection system, through which it reaches out over the industrial, community, and governmental generators of waste material and brings into the marketplace scrap material having an economic value; and that without recycling resources, our economy could not long survive.

NASMI asserts that the railroads inexcusably ignore the environmental impact of this rate increase; that a rate increase on recyclable commodities is inconsistent with Federal policies in that fewer secondary materials would be economically recovered from the solid waste stream; and that economic feasibility is a must to the recovery and recycling of solid waste. It illustrates the critical cost squeeze of recyclable materials by presenting the following information relating to paper stock dealers: Prices on waste commodities are declining, while other prices are spiralling upward. In 1971, the price for all paper scrap items was 32 percent below that of 1966. In comparison, freight rates have been increased 31 percent. This cost squeeze assertedly has caused the demise of many paper stock dealers and mills whose primary source of supply for the manufacturing of paper was paper waste. This situation allegedly applies also to nonferrous metal scrap and textile waste. NASMI states that, as a consequence, incentives, not economic obstacles, to the movement of recyclable waste material are needed.

NASMI points out that carloadings of waste and scrap materials dropped 4.3 percent between 1970 and 1971, which represented a decrease of 32,115 carloads a year. It urges us to exempt all secondary materials from the surcharge, and sees no barrier to such action if, as the carriers seem to allege, the rate increase is minimal.

S.C.R.A.P., the Environmental Defense Fund, Inc. (EDF), the National Parks and Conservation Association (NPCA), and the Isaac Walton League of America.—EDF is composed of more than 25,000 scientists, educators, lawyers, and other citizens dedicated to the protection of the environment and the best use of our Nation's

natural resources. It evaluates and defines environmental issues, collects research data relating to those issues, and determines the action it should take with regard to such matters. NPCA is a public service corporation with over 50,000 members. It is dedicated to the preservation, maintenance, and conservation of our natural resources. The Walton League has approximately 55,000 members, and its goal is the restoration and maintenance of the quality of the environment through the protection and wise use of our natural resources.

These groups assert that this Commissio. must prepare and file an environmental impact statement in conformity with section 102(c) of NEPA [49 U.S.C. 4332(2)(c)] and the guidelines of the Council on Environmental Quality [36 Fed. Reg. 7724 (1971)] prior to granting any interim rail freight charge. They state that no final administrative action may be taken sooner than 30 days after an environmental impact statement has been issued by this Commission; that a 2.5-percent freight surcharge on millions of tons of reusable refuse is clearly a major Federal action significantly affecting the quality of the human environment; and that freight rates are a major overhead factor in the collection and delivery of recyclable materials. It is argued that this Commission has recognized its responsibility to comply with the NEPA in those of its actions which significantly affect the human environment and should act accordingly in this proceeding.

These groups submit that this Commission has failed to comply with the NEPA in this proceeding because (a) the statement filed by the railroads is not an adequate environmental impact statement as outlined by the NEPA and the Council on Environmental Quality, (b) this Commission has made no provision for public comment on the texts of the preliminary environmental impact statements prepared by this Commission's staff, and (c) the surcharge was put into effect without prior adequate consideration of possible environmental consequences and is likely to cause irreparable harm to the environment. It asks that we immediately suspend the operation of the Tariff of Emergency Charges which became effective February 5, 1972.

The Merichem Company.—This industrial concern purchases petroleum refinery wastes and waste sulfide which it ships to its plant in Houston for the recovery there of small amounts of usable chemicals. Although it also purchases cresylic acids and phenol, it does not oppose increased freight charges for the movement of these commodities. It contends that the proposed surcharge, as applied to the waste materials it ships, would have a substantial adverse impact on the environment because it will seriously affect the ability of Merichem (which assertedly cannot bear any additional costs) to remove and recycle these toxic pollutants. Before Merichem was established, these wastes were released into watersheds causing serious pollution of surface and subsurface water resources. Merichem now removes virtually all of the toxic pollutants from refinery waste before disposal. In 1971, it recycled over 550-million pounds of petroleum wastes received from nearly 100 refineries. If rates are raised, Merichem states that it will divert this freight to barges wherever feasible or will abandon shipments altogether. Since the rate increases approved in Ex Parte Nos. 265 and 267, Merichem has been forced to discontinue shipments from 11 refineries. This abandonment assertedly represents 21 million pounds a year in refinery wastes that are not being recycled. Merichem has submitted for our consideration letters from the Environmental Protection Agency, which states that regional waste management like Merichem's is most desirable, and from the Bureau of Domestic Commerce of the Department of Commerce, which urges that we give all due consideration to retaining the existing freight rate level on petroleum refinery waste, inasmuch as any increase would allegedly be detrimental to the recycling of waste materials that would otherwise become pollutants.

B. REPLY STATEMENT

In replying to the above environmental interests, the railroads contend that no impact statement need be completed before this Commission determines whether to allow the Ex Parte No. 281 surcharge to become effective on February 5, 1972. The carriers thus argue that the guidelines established by the Council on Environmental Quality cannot override the railroads' right under the Interstate Commerce Act to publish tariffs effective on 30 days' notice and cannot intrude on this Commission's discretionary power to suspend or not to suspend a proposed change in rates and charges. In support of this position, they cite the decision of the U.S. Court of Appeals for the Second Circuit in *Port of New York Authority* v. *United States*, 451 F. 2d 783 (1971), which found that to permit judicial interference with this Commission's suspension procedures would invite the very disruption in the orderly review of the lawfullness of proposed tariffs that the Congress meant to preclude.

The rail carriers further maintain in reply that the proposed 2.5-percent surcharge will not significantly affect the environment. They state that rail tonnage of all waste and scrap materials has risen from about 38 million tons in 1966 to 41.8 million tons in 1970, and that total consumption of iron and steel scrap increased from 73.5 million tons in 1957 to 94.8 million tons in 1969. The railroads assert that a scrap industry consultant has predicted that United States scrap consumption for steelmaking will rise 20 million tons in the 1970's.

The railroad represents that rail shipments of petroleum wastes to Merichem rose from 97.3 million pounds in 1969 to over 100 million pounds in 1971. They argue that the surcharge on representative movement of petroleum wastes will amount to about 1 cent per hundredweight or less; and that Merichem is financially capable of bearing this added expense. The railroads submit that the protestants, which have presented undocumented generalities in support of their position, have failed to demonstrate why suspension of the surcharge is essential to the preservation or enhancement of the environment.

The rail carriers argue that they cannot be required to subsidize the recycling of secondary materials; that the protestants are urging that the railroads should be deprived so that the protestants or their members may prosper; that this Commission must decide where the money to support environmental projects is to come from; and that the money can either flow from the financially troubled railroad industry or from those profit-making industries which produce or use the scrap or waste. They aver that, without the surcharge, the service protestants now depend upon will be threatened. The railroads seek to demonstrate their concern with ecological problems by pointing out that, despite inadequate earnings, rail carriers in 1970 spent approximately $10 million in a continuing effort to control and, where possible, eliminate pollution; and that they have initiated research activities in such areas as diesel emissions, human waste disposal, used tie disposal and right-of-way clearance.

The railroads note that this Commission in Ex Parte No. 265 concluded that there was little, if any, correlation between rail freight rates and the market for iron and steel scrap; and that they have been utilizing incentive rail rates since 1963 to aid in the transportation of nonferrous metal scrap. They demonstrate that the rate level on 120,000-pound shipments of these commodities is relatively the same as or below the rate level applicable above 9 years ago.

II. STATEMENTS RELATING TO SELECTIVE INCREASES

Initial verified statements relating to the carriers' selective increase proposal filed February 28, 1972, have been submitted by four general categories of participants: (1) the railroads; (2) shippers and shipping associations; (3) governmental organizations; and (4) private environmental interests. The railroads replied to the arguments advanced against the rate increases they propose. These statements will next be considered.

A. INITIAL STATEMENTS

The railroads.—Petitioners contend that the freight rate increases they propose will have no significant environmental impact. They request this Commission to consider the following data and arguments in evaluating environmental matters: (1) the proposed selective increase falls short of the increased cost burden which has already fallen upon the railroads; (2) a number of major rail carriers are already in reorganization as a result of insufficient cash flow; (3) suspension or delay would severely impair the railroads' ability to provide adequate and efficient transportation; (4) distribution of a draft environmental impact statement and the invitation to submit comments thereon should not result in the suspension of the proposed increases; (5) denial of funds to meet increased costs will only impair the rail industry's ability to handle the very products whose movement by rail is urged by those parties interested in environmental matters; and (6) a reduction in revenues generated will impair the railroads' ability to carry out important programs designed to improve the environment. They assert that the suspension or delay of the carriers' proposal on the basis of environmental consideration would be inappropriate and inconsistent with the NEPA and the guidelines established by the Council on Environmental Quality, and contrary to the decision in *Port of New York Authority, supra.*

The rail carriers reiterate their position that there is no connection between freight rates and the consumption of iron and steel scrap and nonferrous scrap, and offer charts purporting to show that since 1967 scrap iron has improved its competitive position (extent of use) in the steel making process vis-a-vis iron ore despite increases in the rates covering the transportation of such scrap material. They also maintain that, for the years 1957 to 1970, the prices of pig iron and iron ore remained relatively stable, but the price of scrap fluctuated from $24.94 a ton to $47.10 a ton; and that the 2.5-percent surcharge favored scrap iron and steel because the average increase on scrap iron was only 14 cents per gross ton whereas the composite increase on pig iron components amounted to 28.7 cents per gross ton. The railroads aver that nonferrous metal and alloy scraps are commodities of considerable value, ranging from 1 cent to 115 cents a pound, and are not basically low valued as pig iron or iron ore and that they have aided the transportation of these commodities through the use of incentive rates. The carriers assert that the 4-percent increase proposed on these commodities would result in an increase of only 3 cents per hundredweight in the freight rate, which would increase the rate to 68 cents per hundredweight or the same rate that was effective in 1963.

In support of the proposed 4-percent increase on petroleum refinery waste and waste sulfide (with an exception), the railroads allege that rates on these commodities are at a very low level; that the proposed increase would result in charges of only $36 per car over the Ex Parte No. 267-B level; and that the net increase would be less than 1 cent per hundredweight above the charges now in effect. The railroads point out

that Merichem's volume has increased to near capacity despite rate increases which have recently taken effect; and they conclude that the past general rate increases have not interfered with the collection of petroleum refinery waste or with the distribution of the recycled product.

In connection with their proposal to increase rates for the movement of fly ash by 6 percent, the carriers note that shippers of fly ash fear that if freight rates increase, builders of dams would use natural pozzolans instead of fly ash; and that fly ash has continued to move in substantial quantities to dam projects and for use in oil well cement, even though there have been increases in the applicable freight rates. While fly ash rates are said to be at a low level, this commodity assertedly must be moved in expensive covered-hopper cars because it would blow out of open-top cars and pollute the atmosphere. The railroads assert that they can continue to keep covered-hopper cars in the service of moving fly ash only if the rates economically justify their use.

The rail carriers state that the movement of scrap paper by rail has been steadily increasing even though there have been several general increases in rates. In 1971, for example, the Southern Railway transported approximately 100,000 tons more scrap paper than it did in 1967. It is argued that, with the proposed rate increases, scrap paper will retain a significant rate advantage over woodpulp and pulpwood.

The proposed increases in rates for the movement of textile wastes would not apply to movements within the South where about two-thirds of the total United States textile production occurs. It is, therefore, believed by the railroads that their 6-percent increase on textile wastes moving in other parts of the Nation, will not significantly affect the quality of our human environment.

Shippers and shipping associations.—These groups and individual shippers generally attempt to illustrate the efforts they are making to aid the cause of ecology. While certain of the shippers argue that increased freight costs would reduce the availability of funds for environmental research by these firms, most of them contend that easier movement of their commodities would be beneficial to the environment. The following represents a summary of the major environmental arguments advanced by these parties.

The scrap iron industry and one steel manufacturer (which uses scrap exclusively) contend that scrap iron and steel is directly competitive with iron ore and that any increase in scrap iron rates must be limited to that proposed on iron ore. These protestants, therefore, believe themselves to be entitled to receive the same 22 cents per gross ton maximum proposed on iron ore. Otherwise, it is alleged, scrap iron will be subjected to unjust discrimination and will be less attractive in the marketplace. The end result will assertedly be detrimental to the environment. Pig iron producers request that this Commission preserve the identity of treatment between pig iron and ferrous scrap in the event a holddown is assigned to scrap for environmental reasons.

Fly ash is an extremely low-value waste commodity used as a pozzolan in the construction of concrete dams in the West. The Chicago Fly Ash Company states the proposed increase will jeopardize its ability to market fly ash since natural pozzolans, consisting mainly of shale and volcanic ash, are abundantly available throughout the territory it serves. If Chicago Fly Ash is unable to market fly ash, it assertedly will create a serious disposal problem which will hamper efforts to clean up the environment.

Shippers of glass containers argue that further rate increases on glass containers will accelerate diversion of this traffic to motor carriage. Members of the brewing industry contend that the 10-percent increase proposed on empty, returned containers is

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excessive and discriminatory in comparison to the 6-percent increase proposed on glass containers and will have an adverse impact on their ability to recycle used bottles and cans.

Merichem avers (1) that the low-valued waste commodities it processes cannot sustain the proposed rate increases; (2) that the increase will cause further diversion of this traffic to barge; (3) that the increase will not be in the public interest as it will cause and has caused a curtailment of the pollution abatement function performed by Merichem in those landlocked areas where it now operates; and (4) that the increase places waste sulfide solution at a competitive disadvantage with caustic soda and salt cake.

Protestants maintain that waste and scrap paper, textile waste, nonferrous metallic scrap, and rubber or plastic scrap or waste are extremely low valued; that transportation charges are determinative of whether they can be marketed; that an increase in rail rates will bring about the diversion of these articles to highway transportation or they simply will not move; and that the latter alternative is unacceptable because of environmental considerations. They further allege that the railroads' present and proposed rates reflect a "price bias" in favor of competing virgin materials (*e.g.*, pulpwood, woodpulp) because those rates represent too high a percentage of the value of scrap materials.

Governmental organizations.—The State of California believes that every effort should be made to encourage the use of recyclable materials to help improve environmental conditions. It, therefore, contends that no increase in freight rates for the transportation of waste and recyclable materials should be granted; that the existing 2.5-percent surcharge now applicable on such commodities should be canceled; and that the basic rates should remain in effect until this Commission has held special public hearings throughout the United States to consider the level of the rates for these specific commodities.

The General Services Administration (GSA) contends that prices of iron and steel scrap rose immediately after the 2.5-percent surcharge took effect; and that such price increases indicate that the railroad rate change did have an impact on the total prices of these commodities and, therefore, on their cost desirability to consuming steel producers. GSA states that a recent report of the Battelle Columbus Laboratories entitled, "The Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap," concluded that present scrap markets are retarded because of transport rates that encourage the use of iron ore, as opposed to ferrous scrap. It asserts that the carriers' present proposal, which provides equal percentage increases on both iron ore and iron and steel scrap, can hardly be expected to improve the situation; and that the national objective is not merely to avoid curtailing the movement of these commodities, but to encourage the increased recycling of the various scrap and waste products. GSA recommends that this Commission disapprove all rate increases applicable on recyclable wastes, scrap, ash materials, and reusable shipping containers, regardless of its disposition of the balance of the railroads' selective increase proposal.

The city of New York requests that we consider environmental matters before reaching a final determination herein, and argues that such consideration should include the question whether increased rail freight rates will divert traffic to motor carriers and cause increased air pollution. The State of Rhode Island also fears a possible diversion to motor carriers which would result in increasing numbers of trucks using the highways and in growing traffic congestion, greater noise, increased air pollution, and more rapid deterioration of pavements.

The United States Department of the Interior lists possible alternatives to a rate increase which include improved economics of operation, reduced maintenance costs, purchase of more efficient equipment, increased traffic growth, and a direct subsidy to carriers. It contends that holddowns for recyclable materials may not constitute special treatment, but rather would be rectification of past biases in freight rates; that no evidence is presented which refutes the existence of discriminatory freight rates; and that there is likewise no evidence to rebut the scrap industry's charge that, based on the relative iron contents of scrap and iron ore, scrap freight rates should be 1.5 (instead of the existing 2.5) times the iron ore freight rate. Interior avers that if the scrap industry's analysis is correct, an exemption or a holddown of the freight rate increase for scrap would not appear to constitute special treatment, but rather an appropriate adjustment to correct past rate discrimination; and that if the percentage rate increase would tend to increase the discrimination of freight rates in favor of iron ore, then a holddown or exemption of scrap from the rate increase would reduce the amount of discrimination.

Interior represents that a scarcity of close-in, land-fill sites and higher land values have forced more municipalities to resort to long-haul rail shipments of waste to distant land-fill sites, that even a small rate increase for long-haul disposal could build a strong competitive position for resource cycling; that legislation is being prepared to allow tax incentives for recovery of recyclable materials, which is intended to encourage commercial recycling systems; and that increased rail rates will divert rail traffic to barges and motor carriers resulting in increased water and air pollution.

The Department of Commerce states that the salvage industry (a term covering firms collecting and processing secondary materials) consisted in 1967 of 7,927 establishments, employing 79,000 people and with total sales of $4.4 billion. Of these establishments, 3,862 were primarily engaged in handling iron and steel scrap and 4,075 were primarily engaged in handling nonferrous metals and other secondary materials. It presents data demonstrating that iron and steel scrap accounted for almost half of the total sales and copper scrap, about one-fifth.

The Department's figures show the trend in size of establishment has been towards larger firms. Of the total firms which operated the entire year, those with sales of $500,000 or more accounted for 12.1 percent in 1958, 17.6 percent in 1963, and 21.0 percent in 1967. The trend towards larger companies has been found to be related to economic and technological factors. Labor-intensive operations have led to greater use of technological innovations to increase labor productivity. The rise in the relatively expensive ferrous scrap shredder, costing from a few hundred thousand to several million dollars to install, assertedly has been occasioned by two factors: the desire to economize through large scale operation; and the need to produce better quality scrap from junk automobile bodies as opposed to baled scrap with undesirable contaminants for certain types of steel with the related need to overcome the air pollution problems of open burning (which is not required prior to shredding).

Commerce contends that in paper, the automated shredding or hammermill processing of waste grades and delivery to a high density continuous baler, reduce freight costs, facilitate materials handling and provide a better product on a handling-to-weight relation basis. To take advantage of such costly modern process equipment, centralization assertedly has taken place in the paper recycling business. The salvage industries in other commodities—textiles, glass, rubber, et cetera, have faced similar economic pressures, with the result of a general decline in the number of firms. In a number of cases, competitive factors have led to greater diversification not only into various secondary materials, but also into related activities, such as demolition, auto wrecking, metal product warehousing, and the import business. Com-

merce reveals that data on profits and other financial aspects of the secondary materials industry are virtually unavailable, primarily because most scrap companies are small, and many of them are family affairs, often partnerships or an individual proprietorship.

The Department states that secondary materials in the metals industries fall into three main categories: (1) home or revert scrap, which is almost entirely generated and consumed in the same plant, (2) prompt industrial scrap, which is generated at metal consuming plants, such as automobile manufacturing plants and returned to metal producing plants, and (3) obsolete scrap, which is derived from out-of-use metal-containing products, including those in demolished buildings. As home scrap assertedly does not move on common carriers between plants, except in rare instances, it does not appear to be a factor in rail transportation. In fact, except in the case of ferrous scrap, it is not taken into consideration in statistics on scrap sources and use. Prompt industrial scrap and obsolete scrap, taken together, constitute the broader category of "purchase scrap," in which receipts and, therefore, movement is involved. Prompt industrial scrap generally moves in large quantity shipments directly between generator and metal producer, and the scrap dealer/processor is not usually a factor in such movements. Furthermore, this type of scrap, moves—as its name indicates—promptly, and it does not constitute an environmental problem from the solid waste disposal aspects.

Commerce represents that the volume of waste paper and board recycled annually over the past 10 years has averaged about 11 million tons. This amounts to about 20 percent of the waste paper generated annually and about 22 percent of the paper and board industry fiber requirements. The more than 50 defined grades, each with its own fiber characteristics and market supply-demand situation, range widely in price.

The emphasis by the secondary materials processing industries, as expressed by their spokesmen, according to Commerce, in connection with railroad freight rate charges, has been on disparities between the base rates on primary and secondary materials as market competitors. (Whatever disparities do exist in the base rates are said to be perpetuated by equal percentage changes in rates between the primary and secondary materials.) Equity in freight rates among competing materials, as a cost of doing business, is, according to the Department, undoubtedly desirable. It points out, however, that this does not necessarily mean parity in the sense of equal rates per unit of material; and that consideration must be given to a number of factors (among them, weight, volume, density, and rail-handling procedures and techniques). This is aside from the question of rail cost and financial factors. Furthermore, the question assertedly remains as to the effect of various freight rates on the movement of these competing materials, or, more specifically, the deterrent effect of disparate rates on the movement of secondary materials according to the Department, where integrated metals producers are concerned, the consumption and demand for secondary materials is related in large part to their costs of producing the competing primary material (*e.g.*, pig iron from captive iron ore). It points out that despite changes in the relative importance of the various types of iron and steelmaking furnaces (particularly through the introduction of the basic oxygen converter, which is a relatively low user of ferrous scrap) variations in the total scrap (home and purchased) pig iron proportions of the total metallic charge have tended to cancel each other out. In 1971, the ratio was almost exactly at the 50-50 level which has prevailed over at least the entire post-World War II period.

Commerce contends that in the case of the junk car, and more particularly the abandoned junk car, on which much attention has been directed in the past several

years, the real breakthrough has been a technological one. The scrap shredder or fragmentizer, by creating higher quality scrap with fewer contaminants, has made possible the increased use of junk car scrap by both steel mills and foundaries. The remaining principal area of concern, among Federal and State agencies, is the removal of legal barriers to the fairly prompt disposal of abandoned cars. In any event, the Department believes, that a significantly faster rate of junk car disposal would have occurred without these two events, regardless of the freight rate on ferrous scrap or on the junk car hulk. One further aspect of the ferrous scrap dealer's problems in reducing freight costs, pointed out by industry representatives, is the locked-in position with respect to alternative modes of land transportation (i.e., trucks) resulting from the relative inaccessibility of such vehicles to scrap storage sites at steel mills. The Department maintains that even if the use of trucks were to increase, through changes at the steel mills, and scrap rates were to decrease, the question of equitability with rates on iron ore, which would continue to be moved by railroads, might still remain.

Commerce notes that as for the paper and board component of litter, this would appear to be solely the result of human carelessness and apathy. The salvaging of paper litter for recycling would, it maintains, be unrealistic from the cost standpoint; and the fibers would be in a general state of deterioration and contamination and essentially unusable. According to the Department, the freight rate question would, therefore, be irrelevant in terms of paper litter. With respect to wastepaper recycling, increased volumes processed at the mills actually create additional water quality and solid waste disposal problems. From 10 to 50 percent of the weight of wastepaper and board is lost in repulping depending upon grade. This includes the separation from the fibers of solids such as inks, dyes, fillers, coatings, adhesives, resins, and general nonfiber contaminants incorporated in the pack. These volumes of solid materials and chemicals are made to pose burdens on solid waste disposal land fill areas and on mill and muncipal water pollution control facilities.

According to the Department of Commerce, the question of equity in freight rates between secondary and primary materials suggest means of achieving equity which has been given consideration. This is the establishment of tax deductions equivalent to the depletion allowances made for virgin materials. Tax incentives for solid waste processing installation, similar to those allowed for air and water pollution abatement facilities, are said to be yet another possibility. On the demand side, procurement regulations have increased Federal Government use of processed paper products, but not other products. This shift at the expense of primary paper products has been justified as a conservation and antilittering measure. Price stablity in the volatile secondary materials industries might be reached through long-term contracts between buyers and sellers. The use of unit trains to achieve transportation cost economics has been mentioned, but does not appear to be feasible for the secondary materials industries, with widely scattered, small suppliers.

The United States Environmental Protection Agency contends that this Commission should examine the cumulative effects of rate increases. It asserts that an incremental freight rate increase may result in an imperceivable environmental impact, while cumulative increases may seriously degrade the environment. It states that the Council on Environmental Quality has notified this Commission that across-the-board percentage increases broaden alleged price biases against secondary materials. For example, it is alleged that if the ratio of scrap iron freight rates to iron ore freight rates were 2.5 to 1 or greater, then any across-the-board percentage increases would increase scrap freight rates 2.5 times greater than iron ore freight rate increases. EPA

states that any across-the-board increase could significantly widen the freight rate differential and could possibly affect the demand for scrap; that this Commission should examine the possibility that cumulative freight rate increases may cause a shift from rail to truck transport in the shipment of both virgin and recycled materials; that ecologist Barry Commoner in his book, "The Closing Circle," observed that the energy required to move a ton of freight a mile by rail averages 624 BTU while trucks required about 3,460 BTU per ton-mile; and that, therefore, transportation by truck causes appreciably more air pollution. A report of the Midwest Research Institute entitled "Economic Studies in Support of Policy Formulation on Resource Recovery" also is said to have found that the virgin material intensive processes are significantly more environmentally degrading than processes consuming greater percentages of recycled materials.

Private environmental interests.—The Isaac Walton League, EDF, S.C.R.A.P., and NPCA requests this Commission to issue an environmental impact statement in compliance with the NEPA and the guidelines of the Council on Environmental Quality. They state that the proposed action, changes in the National Freight Rate Structure which would avoid adverse environmental impacts; and that some of these changes assertedly include (a) creation of a special rate class for secondary materials; (b) placing each secondary material in the same rate class as the primary material for which it substitutes; (c) streamlining the procedure for charging rates for secondary materials; and (d) deregulation of vegetable produce. These parties aver that cost of service would not be incompatible with a holddown on secondary material rates, or disproportionate increase on primary materials; and that this Commission is obligated by the NEPA to consider environmental considerations at the suspension stage of a rate increase proceeding. The following represents a synopsis of the data presented by these parties.

Each year the United States produces more than 4.3-billion tons of solid refuse. Included in this figure are approximately 58.3 million tons of paper, 30 million tons of industrial fly, 15 million tons of scrap metal, 4 million tons of plastics, 100 million tires, 30 billion bottles, and 60 billion cans, most of which could be reused as raw material in various manufacturing processes. Only a small fraction of this material is reused or recycled, in large part due to the high costs of transportation.

The costs of shipping by rail have a direct impact on the movement of secondary materials in commerce. Consequently, increases in these costs are likely to have an adverse impact on the rate at which waste materials are salvaged from the environment and reused by society. As transportation appears frequently to be a large component of the total cost of secondary materials, it is likely that any increase in the freight rates for these materials will have a pervasive effect on the aggregate amount of recycling and on the cost to society of disposing of waste materials. Furthermore, because the present rate structure appears to impose lower rates for the shipment of primary materials than those for the movement of secondary materials, it is likely that any increase in freight rates for these materials will have a pervasive effect on the aggregate amount of recycling and on the cost to society of disposing of waste materials. The present rate structure appears to impose lower rates for shipment of primary materials than secondary materials, and across-the-board percentage increases will exacerbate these discrepancies and encourage more rapid depletion of nonrenewable resources. The Federal Government's leading environmental spokesmen such as Russell Train, Chairman of the Council on Environmental Quality, has

recognized that across-the-board percentage increases in freight charges perpetuate and aggravate the Nation's solid waste problem.

The environmental harm resulting from the freight rate structure has also been substantiated by Battelle Columbus Laboratories. In their report entitled "The Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap" issued on January 14, 1972, Battelle's researchers concluded:

(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore.

(2) Future scrap markets are being affected because new investment that would logically be directed to scrap-intensive steelmaking is diverted because of the existing freight rate structure to ore-intensive steelmaking.

(3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved.

(4) Some scrap iron that should be recycled is unable to move; thus, the environment is despoiled by unnecessary accumulations of solid metallic waste.

In addition to scrap iron and steel, other secondary industries may also be retarded by discriminatory and excessive freight rates, with consequent detriment to the environment. They conclude, but are not limited to, the following: synthetic textile and paper wastes, which if recycled would help conserve our national forests and virgin timber lands; aluminum cans and glass bottles, which require considerably less energy to recycle than to produce originally, thereby reducing the demand on our limited electric power sources and reducing pollution associated with energy production; and fly ash, a byproduct of fossil fuel combustion, which can be recaptured and used as roadfill or for other construction purposes.

Although many people think of recycling as a solid waste problem only, across-the-board freight rate increases may also affect recycling of liquid waste (*e.g.*, petroleum wastes) and gaseous wastes (reclamation of sulfur from sulfur dioxide, for example). Waste sulfide, for instance, offers a classic example of how across-the-board increases in the present rate structure can frustrate recycling and contribute to pollution of the environment.

Waste sulfide is essentially a spent caustic soda byproduct solution derived by processing oil refinery wastes. Its largest potential use is as a chemical required in the papermaking process. According to the testimony submitted by Merichem Company in Ex Parte No. 265, waste sulfide competes in this market with salt cake, which contains soda and is shipped via rail as 98-100-percent usable material, and with caustic soda, which is normally shipped to papermills in a 50-percent usable solution form. Waste sulfide, however, which also contains soda, is limited by tariff restriction to contain not more than 20-percent usable material.

On a chemically equivalent basis, however, these three commodities sell for essentially the same price per ton. Therefore, while waste sulfide must compete at essentially the same price, the same amount of freight rate increase has a much greater impact on the waste sulfide cost structure than on the cost structures of the competitive materials because waste sulfide must be shipped in much more dilute form.

In actual dollar costs there is a tremendous inequity in the effect of a rate increase on waste sulfide as compared to its competition. On a "usable" material basis, a 1 cent per hundredweight, freight increase has the effect on only a 20-cent per ton increase in the transportation cost of 98-100-percent usable salt cake; a 40-cent per ton increase in the transportation costs of 50-percent usable caustic soda, but a $1 per ton increase in the transportation of 20-percent usable waste sulfide. Therefore, the same amount of increase on the three competitive materials has a 250-percent greater im-

pact on the waste sulfide cost structure than on caustic soda, and a 500-percent greater impact on that structure as compared with that on salt cake.

The environmentalist allege that despite accumulating evidence of the adverse impact of increased freight rates on recycling, this Commission's response has been to continue to grant the railroads across-the-board percentage rate increases after only the most superficial examination of the impact these increases have on the secondary materials industry and ultimately on the environment. They point out that since this problem was first called to our attention in 1968, four across-the-board increases have been granted and a fifth is now under consideration.

The environmentalists theorize that even without analyzing the deficiencies of the present rate structure, this Commission can perform fairly straightforward tests to predict the environment impact of the present proposed rate increases. For instance, in some production processes, secondary and primary materials compete directly. At the point where a secondary material substitutes for a primary one, the market should equalize the marginal costs of these competing inputs. A percentage rate increase, therefore, will have a differential impact on consumption of these competing inputs depending upon the fraction of their total cost which is represented by the cost of rail transportation. If the fraction of rail transportation is higher for a secondary material than it is for a primary one (measured at the point where the secondary can be directly substituted for the primary), then the percentage rate increase will increase the price of the marginal unit of the secondary material more than the price of the marginal unit of the primary one. Primary material will then be substituted for secondary until the costs of the marginal units are again equalized. Although a small percentage increase in freight rates may result in a smaller differential between the primary and secondary materials, it nevertheless appears that for even a very small increase in the price differential, very large amounts of primary material may be substituted for the directly competing secondary material before the equilibrium of marginal costs is restored.

The environmentalists admit that often primary and secondary materials are not direct substitutes. For example, a package of both iron ore and coke substitutes for scrap iron. The above test would then apply to the package of materials (including the primary one) which competes directly with the package of materials (which includes the secondary material).

The environmentalists believe that the 2.4-percent rail freight increase will probably have effects on other transport rates. It is asserted that, if other rates also increase, we need to compare the fraction of transportation, in all its forms, of the primary materials with the fraction for the secondary materials. Increase of all rates, not just the "final move by rail" is assertedly likely to have greater adverse effects on the movement of secondary materials.

These parties finally point out that primary and secondary materials are often not perfect substitutes. Secondary materials may have more impurities as well as greater variability in scheduling and pricing. These differences may lead to premiums placed on primary materials, which need also to be taken into account.

B. REPLY STATEMENT

The railroads do not believe that an environmental impact statement is required in this proceeding by the NEPA, but requests that this Commission issue such a statement out of an abundance of caution. They assert that the proposed increases should be permitted to take effect as published, subject to refund and subject to the final environmental statement and decision of this Commission. They allege that EDF and

allied interests have not supplied any factual material for the record and their unsupported assertions are not entitled to any weight; and that the economic analyses offered by the environmentalists are unduly simplistic, do not consider transportation costs and factors, and do not provide a reliable basis for drawing any conclusions as to whether or not the selective increases proposed will have a significant impact on the environment.

With references to petroleum refinery wastes, the rail carriers assert that Merichem is financially capable of operating pursuant to the proposed increases. They note that these commodities can be disposed of by alternative methods which are ecologically sound, such as incineration at the refinery, sale to other buyers of refinery waste in Washington and California, treating with flue gas to remove the sulphur, and sale direct to papermills without intermediate processing. The railroads contend that Merichem has not shown what it pays the refineries for petroleum waste nor has it made any attempt to show why the refineries should not pay to have thier wastes removed in an ecologically sound manner.

The railroads represent that the wastepaper interests have failed to present reliable facts to support their assertions concerning NASMI's argument that there are inequities in freight rates between wastepaper and woodpulp, they point out that the average length of haul within the United States of wastepaper is only 329 miles compared with 865 miles in the case of woodpulp, with average revenue per car of $247 on wastepaper and $663 on woodpulp. It is submitted that these different transportation characteristics necessitate different rate treatment. In response to NASMI's assertion that diversion to highway transportation will occur if the proposed increase is approved, the rail carriers aver that rail tonnage has remained at least constant during 1968, 1969, and 1970 notwithstanding the four rate increases approved by this Commission; and that the railroads earn $236 and $270 per carload of wastepaper at their existing 40,000- and 50,000-pound rates compared with average per car earnings on woodpulp of $663.

The rail carriers maintain that NASMI has made no showing that traffic trends indicate that rail increases have produced or are likely to produce diversion of traffic; that NASMI speaks of the vast accumulation of solid waste that constitutes potential recyclable material, but offers no indication that such normally discarded waste has ever moved to recycling plants by rail; and that there is no relationship between the growing accumulation of discarded textiles and rail freight rates.

The railroads take the position that there is no relationship between freight rate increases and the level of activity in the scrap iron industry, and that there are significant differences in transportation characteristics between scrap iron and iron ore. They allege that the Battelle Study omits consideration of a number of significant factors entering into the decision of the steelmaker to use scrap iron vis-a-vis hot iron (such as capital requirements, geography, and access to markets), and constitutes an oversimplification of the variations that exist between different processes within the steel industry itself.

The rail carriers emphasize that the domestic consumption of scrap iron fluctuated in substantial measure between 1961 and 1966, during which time there were no general freight rate increases and rose to an all-time peak in 1969 after three general freight rate increases; and thus prices of scrap between 1961 and 1969 fluctuated significantly without relation to increases in freight rates or the absence thereof.

In reference to fly ash, the railroads find no sound reason to exempt this commodity from the proposed increase which they regard as modest. They do not believe the rate increase will affect the movement of fly ash.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of September 1972.

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972

The Commission having this day made a report on its investigation of increases in freight rates and charges proposed by common carriers by railroad in the United States in their petitions filed December 13, 1971 (surcharge), and February 28, 1972 (selective increases), and subsequent petitions related thereto, said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That changes in freight rates and charges, to the extent authorized herein, may be made effective upon notice to the Commission and the general public of 15 days with respect to commodities not moving in the recycling process and 35 days in the case of commodities being transported for purposes of recycling, by filing and posting in the manner prescribed in the act.

It is further ordered, That, subject to the same (15-day) notice requirement and contemporaneously with effective implementation of the authority relating to non-recyclable commodities contained in the preceding paragraph, respondents be, and they are hereby, required to cancel (1) the surcharge tariff, as amended, and (2) the selective increase schedules to the extent not approved herein.

It is further ordered, That outstanding orders in other proceedings be, and they are hereby, modified so as to permit establishment of the further changes in interstate freight rates and charges herein authorized.

It is further ordered, That all tariff schedules changing interstate rates or charges under the authority of this order, which rates or charges are maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order.

It is further ordered, That in making effective any increases in rates or charges herein authorized, the respondents be, and they are hereby, required to protect and maintain all established port relationships and to apply any such increases on export or import traffic subject to the limitations provided in this report.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

SUPPLEMENTAL FOURTH SECTION ORDER NO. 20367

It appearing, That, the Commission, by fourth section order No. 20367, entered December 21, 1971, in Ex Parte No. 281, Increased Freight Rates and Charges, 1972, as modified and amended by supplemental order No. 20367, entered February 1, 1972, authorized carriers parties to the proceeding to establish and maintain the increased rates and charges described therein without observing the provisions of section 4 of the Interstate Commerce Act;

And it further appearing, That carriers parties to the proceeding applied for relief from the provisions of section 4 of the act necessary to establish the rates and charges sought; that the increase in rates and charges authorized herein cannot be published and made effective without producing in some instances rates or charges that yield

greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, or greater compensation as a through rate or charge than aggregate of intermediate rates or charges subject to the act, in contravention of section 4 thereof;

It is ordered, That fourth section order No. 20367, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraphs:

It is further ordered, That, carriers subject to the Interstate Commerce Act and parties to said proceeding be, and they are hereby, authorized to depart from the provisions of section 4 to the extent necessary to establish and maintain the increases in rates and charges authorized in the order in Ex Parte No. 281 of this date.

It is further ordered, That, carrier parties to said proceeding be, and they are hereby, authorized to establish and maintain rates and charges authorized in the order of this date, without observing the long-and-short-haul provision of section 4 of the act in cases arising out of the failure to apply the full increases in rates and charges over interstate routes between points in a single State, in turn caused by failure of the State authorities to authorize the full increases permitted in said proceeding.

And it is further ordered, That in those instances in which rates in contravention of section 4 are established under authority contained herein, the schedules containing such shall make reference to this order in the manner required by rule 28 of Tariff Circular No. 20.

AMENDMENT TO SPECIAL PERMISSION NO. 72-2600, as amended, AUTHORIZING CERTAIN DEPARTURES FROM THE COMMISSION'S PUBLISHED TARIFF REGULATIONS

It is ordered, That Special Permission No. 72-2600, as amended, be, and it is hereby, further amended to permit the establishment of the increases in freight rates and charges authorized by the Commission in this order, subject to the terms, conditions, and limitations therein.

It is further ordered, That said special permission, as amended, be, and it is hereby further modified and amended so as to provide that all rule relief authorized shall expire on July 13, 1973, in lieu of January 13, 1973, and that the special permission, as amended, shall be void as authority for filing on and after June 12, 1973.

And it is further ordered, That, in all other respects, the terms of the original permission, as heretofore amended, shall remain the same.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX E

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 2nd day of May, 1973.

EX PARTE NO. 281

INCREASED FREIGHT RATES AND CHARGES, 1972
(Environmental Matters)

The Commission having thus made a report on its investigation of the environmental effects of increases in rail freight rates and charges on the movements of commodities being transported for the purposes of recycling approved by this Commission in the prior report in this proceeding (341 I.C.C. 288); that this said report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

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Supreme Court, U. S.
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No. 73-1971

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY
PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE APPELLANTS IN OPPOSITION TO THE MOTIONS TO DISMISS

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The appellees—National Association of Recycling Industries, *et al.* (NARI), Institute of Scrap Iron and Steel, Inc. (ISIS), and Environmental Defense Fund, *et al.* (EDF)— move to dismiss on the ground that this Court has no jurisdiction of this direct appeal from an order of a three-judge district court vacating and remanding a final order of the Interstate Commerce Commission.[1] They contend that 28 U.S.C. 1253 authorizes direct appeals only from three-judge district court decisions which grant or deny injunctions, and, since there is here no appeal from the denial by the court below of the injunction against the collection of the new rates, jurisdiction does not lie under 28 U.S.C. 1253.

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[1]Appellees' other contentions are answered in our Jurisdictional Statement.

This contention is without merit, as demonstrated both by the legislative history of the statutes involved and the consistent practice of this Court.

The legislative history of 28 U.S.C. 2321-2325, governing the enforcement and review of Commission orders, as well as of 28 U.S.C. 1253, indicates that Congress treated actions to set aside, annul, or vacate and remand ICC orders and actions for injunctions against their enforcement as functionally equivalent, and intended to make no distinction in the procedures applicable to them.

Sections 2321-2325 derived from the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220, (the "Expediting Act") which specified that:

> No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted [except by a three-judge district court]. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case * * * ; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree * * * .

The language of the Expediting Act was carried forward in the various versions of the Judicial Code before 1948. See, *e.g.*, 28 U.S.C. (1940 ed.) 47, 47a.

When the Judicial Code of 1948 was enacted into positive law, the present statutory language first appeared. While the introductory language (28 U.S.C. 2321) used the traditional terms for describing the review jurisdiction, the three-judge provision (28 U.S.C. 2325) now referred, telescopically, to an action for "[a]n interlocutory or permanent injunction" instead of the previous separate references to orders "granting or denying * * * an interlocutory injunction" and suits to "suspend or set aside." Similarly, 28 U.S.C. 1253, providing for direct Supreme Court review, referred, generically, only to orders granting or denying injunctions in civil actions required to be heard by a three-judge court.

Nothing in the brief legislative history of the 1948 revision suggests that any change in the three-judge requirement and direct appeal provisions was intended.[2] Rather, the history indicates that the procedural structure for review of ICC orders was to remain unchanged.

The reviser's notes, printed as an Appendix to the House Report, indicate that harmony with the Expediting Act of 1913 was intended in Sections 2321-2325. H. Rep. No. 308, 80th Cong., 1st Sess., A183, A184.[3] Similarly, the reviser's note to 28 U.S.C. 1253 states that it was designed merely to consolidate the earlier provisions "relating to direct appeals from decisions of three-judge courts involving orders of the Inter-

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[2]An intent to make substantive changes in such a codification of the laws will not be inferred in the absence of a clear legislative expression of such intent. *United States* v. *Ryder*, 110 U.S. 729, 740.

[3]The change in formulation apparently was because the Expediting Act provisions regarding composition and procedures in the three-judge district courts were included in 28 U.S.C. 2284, and the provisions for direct appeal to this Court were covered in 28 U.S.C. 1253, and, as regards the time for appeal, in 28 U.S.C. 2101. *Id.* at A184.

state Commerce Commission" with other direct appeal provisions. *Id.* at A106. The note states that the Section is based on, *inter alia,* 28 U.S.C. (1940 ed.) 47 and 47a, which as noted p. 2, *supra,* contained the Expediting Act language permitting direct review of all three-judge district court orders setting aside ICC orders.

The legislative history thus indicates that 28 U.S.C. 1253 should not be read as limiting the right of direct appeal to cases in which a district court in terms enjoins the enforcement of an ICC order. Instead, that Section was intended to apply also whenever a district court vacates and remands, or otherwise sets aside, an ICC order.

This Court has consistently so applied 28 U.S.C. 1253. For example, in *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade,* 409 U.S. 1005, 412 U.S. 800, it noted probable jurisdiction and decided on direct review a case in which a three-judge court had not in terms enjoined an ICC proceeding, but instead suspended the proposed charges and remanded the proceeding to the Commission. See *Wichita Board of Trade* v. *United States,* 352 F. Supp. 365, 369 (D. Kan.).

Indeed, the question of the equivalence of an action to set aside an ICC order and an action to enjoin such an order was raised by the Court *sua sponte,* and decided, in *Electronic Industries Association* v. *United States,* 401 U.S. 967. There, a three-judge court had dismissed a suit challenging a general revenue order of the Commission on the ground that the plaintiff shippers had failed to exhaust their administrative remedies. *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D.D.C.). On direct appeal, this Court asked the parties to file

additional memoranda discussing the relationship between a suit to enjoin and an action to set aside an ICC order, and discussing whether an action to set aside an ICC order must be determined by a three-judge court. The government responded to this request in a Supplemental Memorandum[4] which urged that, for the purpose of the three-judge court provisions (necessarily including the direct review provisions), suits to enjoin or to set aside ICC orders are functionally equivalent.[5] The Court apparently agreed with this reasoning, evidencing its conclusion that it had jurisdiction of the case on direct review by affirming the district court's order (401 U.S. 967). Similarly, here the three-judge district court's judgment vacating the Commission order, reopening the proceeding, and remanding the case to the Commission, is properly before this Court on direct review.

For the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FRITZ R. KAHN,
General Counsel,
Interstate Commerce Commission.

OCTOBER 1974.

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[4]We are sending appellees a copy of this memorandum.

[5]This equivalence is evident in the present case, for example, in which the district court specifically ordered that "Ex Parte No. 281 is to be reopened for further proceedings consistent herewith" (J.S. App. 50a). Thus, under the district court's order, the Commission cannot terminate its proceeding without complying with the court's highly detailed directives concerning the environmental impact statement. For all practical purposes, therefore, the Commission is in the same position as if the court had in terms issued an injunction requiring it to take such action. And it is, of course, immaterial for purposes of this Court's appellate jurisdiction under 28 U.S.C. 1253, whether such an injunction is properly characterized as interlocutory or permanent.

Supreme Court, U. S.
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No. 73-1971

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. A, pp. 1a–56a) is reported at 371 F. Supp. 1291. The Interstate Commerce Commission's opinion and order dated September 27, 1972, and served October 4, 1972, in Ex Parte 281, *Increased Freight Rates and Charges, 1972* (J.S. App. D) is reported at 341 I.C.C. 290. The Commission's final environmental impact statement and consideration of environmental matters is reported

at 346 I.C.C. 88.[1] The Commission's order of May 2, 1973 (J.S. App. E) is not reported.

JURISDICTION

The judgment of the district court (J.S. App. B) was entered on February 19, 1974. Notices of appeal (J.S. App. C) were filed on April 19, 1974. On June 13, 1974, the Chief Justice extended the time for docketing the appeal to and including July 2, 1974. This Court noted probable jurisdiction on October 15, 1974, and consolidated the case with No. 73-1966. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. See *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372; *Electronic Industries Association* v. *United States*, 401 U.S. 967, affirming 310 F. Supp. 1286.

QUESTIONS PRESENTED

1. Whether the court below, in prohibiting the Interstate Commerce Commission from approving a general railroad rate increase without first conducting a thorough analysis of the underlying rate structure in an environmental impact statement, improperly interfered with the Commission's discretion to determine the appropriate type of proceeding in which to address complex questions relating to rate-making.

2. Whether NEPA requires that a new hearing be conducted to consider an environmental impact state-

[1] Ten copies each of the Commission's final report and order in Ex Parte 281, and of its final environmental statement (App. 9–199) previously have been lodged with the Court. The Commission's final report in Ex Parte 281 contained detailed discussions of commodity groups not involved in this proceeding, and other non-germane discussions, which were omitted from J.S. App. D. See J.S. 1.

ment, where the sole agency decision makers conducted a hearing and considered environmental issues before reaching their decision.

STATUTES AND REGULATIONS INVOLVED

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332, and the Commission's special environmental rules, 49 C.F.R. 1100.250, are set out in the appendix, *infra*, pp. 55–62.

STATEMENT

This is an appeal from a final judgment of a three-judge district court (J.S. App. B) directing the Interstate Commerce Commission to conduct additional proceedings in a general revenue proceeding. This is, we hope, the final chapter in a long and complex litigation that has twice been before this Court,[2] involving the application of the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.* (NEPA), to the special requirements of general revenue proceedings of the Interstate Commerce Commission conducted pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

A. BACKGROUND

Under the Interstate Commerce Act rates are set by the railroads, subject to disapproval by the Commission. A carrier may file a proposed rate increase and after 30 days (or such shorter period as the Commission may authorize) the new rate becomes effective

[2] *United States* v. *S.C.R.A.P.*, 412 U.S. 669; *United States* v. *S.C.R.A.P.*, 414 U.S. 1035.

as a carrier-made rate, 49 U.S.C. 6(3). However, the Commission may suspend the proposed tariff within that 30-day period for a maximum of seven months, while it conducts an investigation into the lawfulness of the rate, 49 U.S.C. 15(7). At the end of the suspension period the carrier may put the new tariff into effect unless the Commission, prior to that time, has completed its investigation and ruled that the proposed rate is unlawful. See *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658.

These procedures govern both the carriers' collective requests for general revenue increases, and individual rate filings. In general revenue proceedings, such as Ex Parte 281, involved here, the carriers as a group seek to increase the average rates charged. The average increase is an aggregate of the increases for particular commodities or specific groups of commodities; however, no specific authority is sought for any one of the particular increases. If the carriers demonstrate that the general revenue increase is needed to enable them to provide the Nation with adequate transportation and the Commission determines that it is consistent with the public interest, the Commission will authorize a permissive general revenue increase.[3] In such proceedings the Commission does not determine the reasonableness of individual

[3] See, *e.g.*, *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 D. D.C.), affirmed by an equally divided court *sub nom. Atlantic City Electric Co.* v. *United States*, 400 U.S. 73. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 814, n. 10.

rates, nor does it consider the relationship of rates for different classes of commodities. Its authorization of the general revenue incease simply gives carrier management more discretion within which to set their individual competitive rates.[4]

Faced with increasing costs during a time of inflation, and with deteriorating capital and cash flow positions (J.S. App. D, pp. 4d–20d), in December 1971, the Nation's railroads collectively petitioned the Commission for authorization to file a temporary 2.5 percent surcharge on nearly all freight rates. This emergency interim measure was intended to redress the railroads' financial condition pending their filing of proposed permanent selective revenue increases.

Because it believed that the railroads had a critical need for additional revenues the Commission permitted the surcharge to take effect on February 5, 1972, on condition that it expire before June 5. The railroads then filed proposed selective permanent increases averaging 4.1 percent. On April 24, 1972, the Commission began an investigation into the lawfulness of the permanent rate increases and suspended the increases for seven months, the maximum period allowed by Section 15(7). Because the suspended permanent increases were intended to supplant the emer-

[4] If a railroad does decide to amend its tariff, the Commission's general revenue order means that a shipper challenging any individual rate increase that is within the percentage increase authorized in the general revenue proceeding must establish that the new rate is unreasonable or otherwise unlawful. The general revenue order does no more than shift the burden of proof from the carrier to the shipper.

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gency temporary surcharge, the Commission authorized the railroads to continue to collect the 2.5 percent surcharge until November 30, 1972—the end of the suspension period on the selective increases.

B. COMMISSION PROCEEDINGS AND ENVIRONMENTAL CONSIDERATIONS

When the Commission, on December 21, 1971, advised the railroads that it would not suspend an interim surcharge, it also requested them to provide the Commission with information—in the form of an environmental impact statement—concerning the environmental effects of any proposed change in the rate structure. The railroads complied with the Commission's directive, and their statement was filed on January 3, 1972.[5]

This procedure was in compliance with the environmental rules then under consideration by the Commission as a means of implementing the Commission's responsibility, under Section 102(2)(B) of NEPA, to "identify and develop methods and procedures" for incorporating environmental considerations into all Commission decisions. Formal regulations under Section 102(2)(B) were published on January 14, 1972, and became effective March 28, 1972. See 340 I.C.C. 431; 49 C.F.R. 1100.250 (App. *infra* pp. 58–62). These regulations provide that the Commission itself will make a detailed environmental impact statement whenever "the regulatory action taken by the Commission * * * will have * * * a significant environmental

[5] The Commission summarized this statement at J. S. App. D, pp. 93d–94d.

impact." 49 C.F.R. 1100.250(b)(2). The regulations further require that with "all initial papers filed with this Commission by a party, there shall be" submitted an environmental impact statement, meeting the criteria of Section 102(2)(C) of NEPA, if it appears that the party's proposal will have a significant effect on the environment. 49 C.F.R. 1100.250(d). All environmental statements, whether drafted by the Commission or by a party, are to be served on other interested parties and governmental agencies, and their comments are invited. These rules thus seek to ensure that, in every proceeding before the Commission, all parties will focus from the outset on the possibility of environmental considerations, and that they will be in issue throughout the established agency process.

In order to introduce additional environmental considerations into the railroads' request in this case for the permanent selective increases, the Commission's staff prepared a draft environmental impact statement, dated March 1, 1972, and served March 6, 1972. The statement concluded that no substantial environmental effects would be produced if the proposed permanent selective increases went into effect (J.S. App. D, pp. 89d–92d). Comments were invited on this draft impact statement, and were received from numerous protestants, interested persons, and government agencies (see J.S. App. D, pp. 98d–107d).

On June 15 and 16, 1972, oral argument was held before the Commission on the permanent selective increases. All interested persons were invited to address the issues, including the environmental issues, involved in Ex Parte 281. The Commission's decision,

dated September 27, 1972, and served October 4, 1972 (J.S. App. D), deals in some detail with the environmental implications of the rate increase (J.S. App. D, pp. 20d–35d, 49d–85d). The Commission considered both its draft environmental impact statement of March 6 and the comments made in response; after this "extensive consideration," *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 683, n. 11, it concluded once more that no serious environmental effects would result from a marginal increase in most rail rates, in which the ratio of rates for recyclables to rates for virgin materials would be unchanged. Even so, out of an abundance of caution, the Commission ordered that rate increases on nonferrous scrap not exceed three percent (J.S. App. D, p. 60d). Moreover, the Commission withheld approval of all increases on recyclables by requiring the railroads to file their tariffs on recyclables on at least 35 days' notice (J.S. App. D, p. 87d). Two Commissioners dissented and would have disapproved the increases on recyclables (J.S. App. D, pp. 87d–88d).

During those 35 days the Commission continued to study the environmental problems, and received additional comments concerning its decision of October 4. As a result of these comments, when the railroads filed their proposed tariffs embodying the specific increases on recyclables the Commission, on November 7, 1972, suspended the tariffs, as applied to recyclables, for the maximum seven-month period allowed by statute and invited additional comments. This effectively reopened Ex Parte 281.

The Commission's staff then compiled an extensive bibliography of books, articles, and other materials that could bear on the results of a rate increase. This bibliography was distributed during December 1972 (see App. 161–182). The Commission itself published a second environmental impact statement dated March 5, 1973, and released March 13, 1973. This statement was more comprehensive than the first statement, but again concluded that permitting the selective increases to become effective would have no significant adverse impact on the environment. After receiving additional comments on this impact statement (see App. 191–198), the Commission concluded that the rate increases should be allowed to become effective.

The Commission's decision, dated May 1, 1973, and released May 2, 1973, extensively considered and responded to the comments submitted in response to the impact statement. The final decision contained a discussion of general environmental considerations (App. 17–58, 157–158), an examination of the nature of the rail rate structure and of the contentions that the rate structure is more favorable to virgin than to recyclable materials (App. 24–55), and a thorough discussion of the potential for diversion of freight from rail to truck transportation (App. 58–65). It considered the environmental questions on a commodity-by-commodity basis (App. 70–137). Because ferrous scrap is the major recycled waste product, the statement also considered the effects of the rate structure on steel-making technology and the steel industry, and of steel-making technology on the demand for ferrous scrap (App. 76–82). The Commission attempted

to draw inferences about the elasticity of demand for scrap and the consequent effect of a change in rail rates; its data showed no significant correlation between the trend of rail prices and the fluctuations in the employment or price of secondary commodities (App. 67). Finally, the Commission discussed alternatives to rate increases on recyclable commodities, and concluded that scrap users and shippers—rather than transportation companies through nonremunerative rates—should bear the cost of shipping scrap (App. 140–157).

After weighing all of these considerations and alternatives, including those discussed in its second environmental impact statement, the comments thereto and "all available literature" compiled in the bibliography (App. 14), the Commission once more concluded that an across-the-board increase in the rates for transportation of both recyclable and virgin materials would not have a significant adverse effect on the environment and that, to the extent there was any effect, it was justified by the railroads' pressing need for funds and the principle that shippers should pay just and reasonable rates for each class of commodities shipped (App. 158). The Commission therefore terminated the proceeding, allowing the rates to go into effect on June 7, 1973, approximately one and one-half years after the railroads first had requested the increase.

C. PREVIOUS JUDICIAL PROCEEDINGS

At numerous points in the Commission's proceedings environmental groups, and other interested parties, have sought judicial review of the Commission's

actions. Immediately after the Commission first suspended the permanent selective increases and extended the duration of the interim surcharge, a group of law students—Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)—filed suit alleging that the Commission's environmental considerations in deciding not to suspend the surcharge were inadequate. Other interested environmentalists intervened in this suit. The three-judge district court enjoined the railroads from collecting the surcharge, and ordered the Commission to vacate its order permitting the surcharge to become effective without suspension. 346 F. Supp. 189 (D. D.C.). This Court reversed, holding that under Section 15(7) of the Interstate Commerce Act the Commission has exclusive power to suspend rates pending its decision on their lawfulness, and that NEPA had not conferred on the district court any authority over such suspension decisions. *United States* v. *S.C.R.A.P.*, 412 U.S. 669.

While that case was pending in this Court, S.C.R.A.P. and the other groups sought to enjoin the permanent increases that the Commission had authorized on October 4, 1972. On January 9, 1973, the district court denied the requested injunction in light of the Commission's November 7 order suspending the tariffs on recyclables and reopening Ex Parte 281. 353 F. Supp. 317 (D. D.C.). After the Commission on May 2, 1973, again approved the increases, the plaintiffs on May 30 renewed their request for an injunction. On June 7, 1973, in an unpublished order, the district court preliminarily enjoined the Commission from permitting, and the railroads from collecting, the increases.

The next day the Commission and the railroads filed applications in this Court seeking a stay of the district court's order. Mr. Chief Justice Burger that day granted the stay; on June 25, 1973, this Court denied an application to vacate the stay. 413 U.S. 917. The district court's injunction subsequently was vacated, 414 U.S. 1035, and the case was remanded for further consideration in light of *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade,* 412 U.S. 800.

D. THE PROCEEDINGS NOW ON APPEAL

While the government's appeal from the June 7 injunction was pending in this Court, the appellees filed motions for summary judgment in the district court. They sought (1) a declaration that the Commission's approval of the selective rate increases was void because the environmental impact statement was inadequate; (2) an order directing the Commission to prepare a new impact statement and reconsider the rate increases; and (3) a permanent injunction forbidding the railroads from collecting the increased rates on recyclables authorized by Ex Parte 281. The government and the railroads filed cross-motions for summary judgment; the railroads also filed affidavits demonstrating the severe financial effects on them of any injunction prohibiting their collection of the increased rates.

On February 19, 1974, the district court set aside the Commission's approval of the increases on recyclables, and ordered the Commission to reopen Ex Parte 281, issue another impact statement, and reconsider in full all of the issues in the proceeding (371 F. Supp. 1291; J.S. App. A).[6]

The court held the Commission's environmenal impact statement inadequate. The most important defect, in the court's view, was that the statement confined its "analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). The court also believed that the impact statement inadequately analyzed the elasticities of demand of many of the scrap categories, and therefore could not have shown with certainty the effect of a particular rate increase on the use of the transported goods (J.S. App. A, pp. 31a–32a).[7]

The district court also ruled that the Commission had failed to give sufficient consideration to the impact statement it drafted because, after the impact statement of March 5, 1973, was circulated, the Commission did not hold new oral hearings but instead allowed only written commentary; the court held that the Commission had thus failed to follow the NEPA requirement that the impact statement accompany the pro-

[6] However, the district court declined to enjoin the railroads from collecting the increased rates. J.S. App. A, pp. 6a, 44a–50a. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800.

[7] The court referred also to what it regarded as subsidiary "defects" of the statement, such as the "defensive and advocatory language and style in which it is written," J.S. App. A, p. 29a; the fact that it was prepared by the Commission's staff, J.S. App. A, p. 23a (see n. 11, *infra*); and the alleged failure of the final report to "confront or even acknowledge the critical comments" of other interested parties, J.S. App. A, p. 23a. See p. 35, n. 16, *infra.*

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posed rate increase through all existing agency review procedures (J.S. App. A, pp. 42a–43a).

District Judge Flannery dissented (J.S. App. A, pp. 51a–56a) on the ground that the district court did not have jurisdiction to entertain a challenge to a general revenue proceeding of the Commission; Judge Flannery would have required S.C.R.A.P. and others to begin proceedings in the Commission alleging that a particular rate was not just and reasonable. On the environmental issues, he concluded that the Commission's procedures had complied with NEPA because the Commission "has clearly taken the 'hard look' at possible environmental consequences mandated by Congress" (J.S. App. A, p. 55a).

SUMMARY OF ARGUMENT

The basic purpose of NEPA is to ensure that federal decision makers give full consideration to the environmental effects of their decision; NEPA adds a new factor to the other factors particular agencies ordinarily must weigh. But neither NEPA as a whole, nor the requirement in Section 102(2)(C) that the agency prepare an impact statement, elevates environmental factors to a dominant position. It is sufficient for the agency to take a hard look at the potential environmental effects (in accordance with NEPA's procedural requirements) and to exercise its statutory responsibilities in light of that hard look.

The practical meaning of the required "hard look" necessarily depends on the particular function the agency is performing and the type of decision under consideration. The peculiar limitations of the Com-

mission's role in a general revenue proceeding are thus significant. In such a proceeding the Commission does not propose action but merely passes on the legality of action that emanates from the railroads. Such a proceeding operates under severe statutory time constraints, and the Commission accordingly bases its deliberations essentially on marginal concerns; it takes as given the previous rate structure and assesses the legality of the proposed changes. And the Commission's decision, of course, must be based on accepted ratemaking criteria. In light of these considerations, we submit that the requirements of NEPA were satisfied here.

I.

The Commission here gave "extensive consideration to environmental aspects of the rate increases," *S.C.R.A.P., supra,* 412 U.S. at 683, n. 11. Environmental considerations pervaded the general revenue proceeding. The railroads were required to submit their own impact statement. Comments were invited on those materials. The Commission published an impact statement and invited comments in March 1972. All interested persons who wished to do so submitted written comments and appeared at oral hearings held in June 1972, and the Commission's decision in October 1972 discussed environmental concerns that had been suggested. The Commission then published its bibliography and solicited comments. It issued a massive impact statement analyzing in detail not only the general environmental arguments that had been advanced since early 1972, but also the potential impact

by commodity group. Comments again were invited and considered. Finally, the Commission approved most of the increases on scrap, but limited the increases on non-ferrous scrap to three percent. In doing so, the Commission determined that there would be no significant adverse effect on the environment, and that the possible environmental impact in certain categories of scrap was justified by countervailing considerations. We submit that this procedure fulfilled the duties imposed by NEPA on the Commission.

The district court, however, found the procedure inadequate. To the extent the court did so because of alleged defects in the impact statement itself, it was both overemphasizing the role of the impact statement in the process of giving consideration to environmental effects, and improperly substituting its judgment for that of the Commission concerning the magnitude of the potential environmental effects identified by the statement and the protestants.

II.

The decision below also improperly interfered with the Commission's authority to govern its proceedings. The Commission traditionally has used the general revenue proceeding only as a temporary expedient, a method of authorizing an overall rate increase without an examination of particular rates or of the basic rate structure. Particular rates always may be challenged by protestants in separate proceedings. Moreover, although thorough examinations of the entire rate structure are infrequent, one is now under way in Ex Parte 270; it was commenced four years ago and

will consume several years more before it is completed. The district court's directive to the Commission to consider in a general revenue proceeding all of the environmental effects of the entire rate structure effectively would prohibit the Commission from holding general revenue proceedings, which must be completed within seven months. This is a substantial interference with the Commission's ability to decide on the most efficient method to conduct its enquiry; it was entirely reasonable for the Commission to decide, as it has, to investigate the entire rate structure in a single, consolidated proceeding, while limiting its consideration of other rate requests largely to their marginal effects on both the rate structure and the environment.

III.

It also was proper for the Commission to conclude its environmental consideration without holding oral hearings after it had issued the March 1973 impact statement. The Commission's general revenue proceedings are rulemaking under Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, and such proceedings do not require oral hearings. The Commission sometimes conducts such hearings at some point in a general revenue proceeding, but it does not entertain oral hearings in all or even most such proceedings, let alone separate oral hearings on each issue. There was, accordingly, no requirement under NEPA that the Commission reopen the entire general revenue proceeding and afford new hearings.

ARGUMENT

I. THE COMMISSION'S CONSIDERATION OF ENVIRONMENTAL FACTORS WAS ADEQUATE

A. NEPA REQUIRES THE COMMISSION TO TAKE A HARD LOOK AT ENVIRONMENTAL FACTORS

Like its predecessor *United States* v. *S.C.R.A.P.*, 412 U.S. 669, this case involves problems of accommodation between the National Environmental Policy Act of 1969 (NEPA) and the Commission's disposition of a general revenue proceeding under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7).

NEPA was enacted to ensure that federal agencies would consider the environmental effects of their decisions. See, generally, Hearing before the Senate Committee on Interior and Insular Affairs, on S. 1075, S. 237 and S. 1752 (National Environmental Policy), 91st Cong., 1st Sess. 24–34. Congress chose several tools to bring about this consideration: it required each agency to utilize the natural and social sciences and the environmental arts when the agency's decision might have an impact on the environment (Section 102(2)(A)); to identify and develop methods and procedures to ensure that environmental considerations enter into all decisions (Section 102(2)(B)); and to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment" a detailed statement concerning environmental effects and alternatives (Section 102(2)(C)). This last requirement—the "environmental impact statement"—essentially requires the agency to set

down in words the environmental effects it has found, and the considerations it deems relevant, in light of the investigations required by Section 102(2)(A), (B), and (D). The statement's preparation, therefore, does not require additional investigations beyond the scope of those specified in the other parts of Section 102. The function of the impact statement is to alert the public and other federal agencies to the environmental issues potentially raised in an agency proceeding, so that they may comment; it also is useful to remind the agency itself of the environmental concerns—it is to "accompany the proposal through the existing agency review processes" (Section 102(2)(C)).

The impact statement is thus no more than the agency's report to the public and to itself concerning its environmental findings. Accordingly, the impact statement requirement does not mean the agency is required to adopt any particular form of environmental review; nor does it alter the laws that control the conduct of the Commission's proceedings or the laws that govern judicial review of the Commission's actions. *S.C.R.A.P., supra,* 412 U.S. at 692–694. As Senator Jackson, the principal sponsor of NEPA, stated on the floor of the Senate, NEPA's procedural requirements simply direct "all agencies to assure consideration of the environmental impact of their actions in decision-making" (115 Cong. Rec. 40416). See *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109, 1114 (C.A.D.C.):

> The apparent purpose of the "detailed statement" is to aid in the agencies' own decision making process and to advise other interested agencies and the public of the environmental consequences of planned federal action.

Accord, *Cape Henry Bird Club* v. *Laird*, 359 F. Supp. 404 (W.D. Va.), affirmed, 484 F. 2d 453 (C.A. 4). There is no suggestion in the legislative history of NEPA that Congress intended to require a particular form of compliance with the requirement that environmental considerations be discovered and communicated to the public. It was enough that the discovery and communication take place. Nor is there any suggestion that environmental considerations are to dominate other concerns when the agency is considering them in reaching a final decision.

Accordingly, the federal courts properly have applied a rule of reason when ascertaining whether a federal agency has complied with the requirements of Section 102.[8] "So long as the officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress," they have fulfilled the duty imposed on them by NEPA. *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.).

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[8] See, *e.g.*, *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 470 F.2d 289, 294–297 (C.A. 8); *Bradford Township* v. *Illinois State Toll Highway Authority*, 463 F.2d 537 (C.A. 7), certiorari denied, 409 U.S. 1047; *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (C.A.D.C.); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656–657 (C.A. 10); *Upper Pecos Association* v. *Stans*, 452 F.2d 1233 (C.A. 10).

Although every federal agency must take a hard look at the environmental consequences of its decisions, the nature of the inquiry that is appropriate and required depends on the nature of the function performed by the agency and the type of decision under consideration. *Scientists' Institute for Public Information, Inc.* v. *Atomic Energy Commission*, 481 F.2d 1079, 1091–1092, 1095, n. 68 (C.A.D.C.). It is thus significant that the Commission here performs a function different from that of many other federal agencies. Railroad rates are set in tariffs filed by each rail company. The role of the Commission is limited. The Commission may investigate a proposed rate, and declare that it is not just and reasonable; it may suspend rates for as long as seven months in order to complete such an investigation. But if the Commission cannot declare that the rate is unlawful, it takes effect. The process is instigated by private parties. The Commission essentially adjudicates the lawfulness of the carrier's proposed rate. To be sure, the Commission is an active adjudicator; Commission staff gathers information independent of that submitted by the parties and protestants. But its role is less active than that of other agencies that propose specific projects, decide whether the project will take place at all and, if so, where it will be built or occur and in what form.

The Commission's role is more limited still in a general revenue proceeding, as it explained in this case (App. 148–149):

> The general rate case or general revenue proceeding is altogether different [from rate adjustment or investigation proceedings]. * * *

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> Our authorization of the requested increases, or some other increases, which we determine to be just and reasonable, in no way is an approval by us of the resultant rates and charges on specific articles and movements. It merely is an indication by us that we are persuaded by the railroads' revenue requirements and that they may increase their rates and charges to the level authorized by us to meet their demonstrated needs for increased revenues. * * * [O]ur authorization in general rate cases or general revenue proceedings *does not connote our sanction of any particular rate or group of rates as increased* by the railroads * * * [emphasis added].

The Commission's approval of a general revenue increase does no more than indicate that the railroads have an overall need for increased revenues.[9] It does not approve any particular tariff setting forth a specific rate for any commodity. After the general rate increase has been approved each railroad must file a tariff setting out each rate increase; these tariffs may be challenged on any appropriate ground and the Commission's action in the general revenue proceedings merely shifts to the protestant the burden of assailing a tariff established within the percentage increases authorized in the general revenue proceeding. The general revenue proceeding is useful to the Commission, the railroads, and the public precisely because it is "general"—it is addressed to an overall need for revenue and leaves other and more specific questions for another proceeding. Only by this division of functions is it possible for rates to be studied in time for the Commission's decision to be useful.

[9] See cases cited in note 3, *supra*.

In these circumstances, we submit, NEPA does not require the Commission to conduct environmental studies or make environmental reports more exhaustive in scope than the fiscal and financial studies and reports that are at the heart of a general revenue proceeding. It is our position that the Commission fulfills its duties under NEPA if it undertakes in good faith to ascertain the potential environmental consequences of its general revenue decisions (Section 102(2)(A)), and makes a reasonable attempt to ascertain the magnitude of those effects (Section 102(2)(B)). If the Commission determines, as a result of these preliminary and "automatic" environmental investigations that the decision confronting it would "significantly affect * * * the quality of the human environment," it must set down the nature of this effect in a "detailed statement" so that it can be discussed both within and without the agency (Section 102(2)(C)). The Commission must listen to comments concerning its preliminary analysis (Section 102(2)(C)), and, if a conflict between environmental values and other concerns of the Commission develops, the Commission must analyze alternatives that might minimize that conflict (Section 102(2)(D)). But having done all of this, the Commission is entitled to reach its own decision concerning the resolution of the conflict, subject only to the ordinary requirement that the Commission's ultimate decision not be arbitrary or capricious in light of the evidence developed. Cf. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Sys-*

tem, Inc., No. 73–1055, decided December 23, 1974, slip op. 4, 10–12; *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749, 753. There is no requirement in Section 102 that the environmental examination be exhaustive or unceasing; nor is there any requirement that the environmenal analysis be more extensive than the analysis suitable to the other factors that the Commission must consider in the general revenue proceeding. Indeed, the impact statement specified in Section 102(2)(C) is not required at all unless the preliminary analysis required by Section 102(2)(A) and (B) reveals significant environmental consequences. The agency is not required—to change the well-known metaphor—to conduct a search for the soot speck in the haystack. Cf. *Louisiana* v. *Federal Power Commission*, 503 F.2d 844, 875–877 (C.A. 5).

B. THE COMMISSION'S ANALYSIS INCLUDED A HARD LOOK AT ENVIRONMENTAL CONSEQUENCES

1. Environmental Considerations Pervaded Ex Parte 281

Although a general revenue proceeding is by its nature rapid and not an exhaustive investigation, and although the Commission is responsible only for approval of a revenue increase rather than for the specific rates, environmental considerations, addressed to the propriety of specific rate increases on recyclables (scrap), entered Ex Parte 281 at its outset. The Commission on December 21, 1971, required the railroads to file an environmental impact statement. They complied on January 3, 1972. From that point on the parties and protestants were on notice that the Commission actively was considering the environmental consequences of a general rate increase. All were entitled to comment to the Commission on the railroads' submission.[10] See 49 C.F.R. 1100.250(e)(2) and (3).

In order further to facilitate discussion the Commission's staff prepared, and the Commission released, a draft environmental impact statement, which was served on March 6, 1972. The parties were told that the Commission did not believe that there would be significant environmental effects from a general rate increase. Again the concerned parties were at liberty to file comments disagreeing with this evaluation; many did so. The Commission listened to additional comments at the oral hearing on June 15 and 16, 1972. The Commission's decision, served October 4, 1972, fully considered the environmental problems and, with all of the contrary views before it, it again concluded that there would be no significant impact. However, out of an abundance of caution, the Commission limited increases on nonferrous scrap to three percent, which would make such scrap relatively more attractive compared with virgin materials, the transportation costs of which were increased more greatly. The Commission also extended to the maximum the notice

[10] Cf. *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069 (C.A.D.C.), holding that an applicant's impact statement, together with analysis and comment by the agency's staff, may fulfill an agency's NEPA obligations.

the railroads would be required to give before the rates on scrap could become effective, so that it could continue to consider the increases on recyclables.

During this interim additional comments were received. As a result the Commission suspended the tariffs on recyclables for the maximum seven-month period permitted by Section 15(7), effectively reopening Ex Parte 281. The Commission published a comprehensive bibliography of literature bearing on the environmental effects of rate increases, and accepted comments and suggestions of additional literature that should be surveyed. It then published another draft impact statement (App. 200–420), this one much more extensive than the first. This second impact statement, served on March 13, 1973, discussed all of the points and considerations that had been raised since the proceedings began more than a year earlier; it included discussions of "discrimination" against recyclables as a class, the potential for diversion of rail traffic to "more polluting" transportation means such as trucks, and a commodity-by-commodity study of the impact of the rate increases. Environmental comments were again invited—for the sixth time in Ex Parte 281. It was only after this sixth round of environmental publication followed by comment that the Commission finally concluded that an across-the-board rate increase would not significantly affect the environment, and terminated Ex Parte 281.

We submit that it is apparent from this chronology that the Commission was sensitive to the potential effect of rate increases on the environment, and that it took the hard look required by NEPA.

2. The Commission's Environmental Impact Statement Was Adequate

The district court, instead of considering the entire record of the Commission's consideration of environmental factors in Ex Parte 281, focused its critique solely on the draft environmental impact statement of March 13, 1973, as adopted in the May 2, 1973 Commission report. We submit that this was improper. NEPA was intended to produce adequate environmental consideration; the impact statement required by Section 102(2)(C) is not an end in itself but simply one means among many to produce such adequate consideration. Accordingly, where the record discloses adequate consideration of environmental factors, technical defects in an impact statement do not prevent the agency from making a valid final decision. See, *e.g.*, *Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961; *Upper Pecos Association* v. *Stans, supra,* 452 F. 2d at 1237; *City of New York* v. *United States,* 344 F. Supp. 929 (E.D. N.Y.) (Friendly, J.).

In any event, the district court's criticisms of the Commission's impact statement are not persuasive.[11] As this Court has noted, the gravamen of the environmentalists' allegations of adverse environmental ef-

[11] There is no substance to the district court's denigration of the Commission's final impact statement as a "staff-prepared impact statement" (J.S. App. A, p. 23a). Although the Commissioners of course employed staff assistance to perform the physical task of research and writing (cf. *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777 (S.D. Tex), affirmed *sub nom. Herrin Transportation Co.* v. *United States*, 366 U.S. 419), the final statement was adopted by the full Commission as its own and is an official Commission document.

fects resulting from a general rate increase is that "a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods * * * ." *S.C.R.A.P., supra,* 412 U.S. at 688. The critical issue, therefore, is whether the movement of scrap is in fact retarded by relatively small increases in the freight rates for all classes of commodities. The Commission, after full analysis of all evidence currently availabe, concluded that the movement of scrap is insensitive to minor rate changes.

Because the principal controversy centered upon iron and steel scrap, the Commission gave primary attention to those commodities. The Commission found that ferrous scrap prices fluctuate in a pattern not correlated to the underlying transportation rates (J.S. App. D, p. 65d). For example, between 1968 and 1973 the Commission authorized a 6% general increase effective in November 1969; a 6% increase effective in November 1970; and an 11% increase effective in April 1971 (Ex Parte 262, 265, and 267). During that period, according to *Metal Statistics 1973,* published by American Metal Markets, N.Y., the price of scrap fluctuated as follows:

No. 1 heavy melting scrap steel (composite average of prices at Pittsburgh, Philadelphia and Chicago)

[In dollars per gross ton]

	1968	1969	1970	1971	1972	As of Sept. 26, 1973 *
Annual average.....	35.94	30.56	44.95	34.46	36.63	58.83
High.....	31.62	35.36	46.04	40.81	41.97	.....
Low.....	23.11	26.33	35.95	31.08	33.09	.....

* Quotation Published in Daily American Metal Market.

Thus, despite freight rate increases throughout the period the price of scrap fluctuated, with the high price of 1970 exceeded only by the 1973 price. Apparently market factors other than freight rates are primarily responsible for scrap costs.[12] Moreover, freight rate increases are a relatively small portion of scrap costs (J.S. App. D, p. 63d) and are considerably smaller than the year to year or even month to month variations in price, which range as high as $8.64 per ton over short terms during which freight rates have remained constant (J.S. App. D, pp. 66d–67d).

In fact, as the scrap industry itself has admitted in other contexts, rail transportation rates are not critical. The demand schedule for scrap, not freight rates, is the primary determinant. Dr. Herschel Cutler, Executive Director of the Institute of Scrap Iron and Steel, stated in recent testimony to Congress that the problem of recycling ferrous scrap will not be solved until the steel industry starts buying more scrap (App. 266). With respect to iron and steel scrap, the Commission considered in detail the manufacturing process, with particular attention to the technology the scrap and the ways in which it can be used in competition with virgin ferrous materials (App. 70–82). As the Commission found in its impact statement, technological limitations unrelated to transportation inhibit greater use of scrap.

[12] In the scrap industry the seller pays the freight charges (J.S. App. D, p. 64d), so that a freight rate increase, given ordinary and stable demand schedules, would increase the delivered price of scrap by slightly less than the increase in rates.

Similarly, other secondary materials are affected minimally by increases in rail rates. In the paper industry, for example, processing plants traditionally are located near sources of pulpwood rather than near sources of recyclable paper; this imposes greater transportation costs on the latter because of greater distances (App. 87). Moreover, virgin products have been available at low cost, thus making it very hard for the recyclable commodities to compete (*ibid.*). All this properly led to the conclusion that the maximum 3% increase on wastepaper would not have a significant adverse effect on the environment (App. 97).

The Commission also analyzed the assertion that scrap contributes a disproportionate share of rail revenues over costs, and concluded that this contention is inaccurate. As the Commission explained in *Institute of Scrap Iron and Steel, Inc. v. Akron, C. & Y. R.*, 316 I.C.C. 55, 62–63, sustained *sub nom. Frank Adams & Co. v. United States* (unreported, Civ. No. 5093, S.D. Ohio, May 8, 1963), affirmed *per curiam*, 375 U.S. 215:

> The movement of iron ore is highly concentrated. Ninety percent of the total traffic moves from seven Lake ports and three north Atlantic ports, and is delivered to the railroads by vessels in quantities averaging over 12,000 gross tons at the Lake ports and 23,000 gross tons at the Atlantic ports. The remainder of the iron ore traffic originates at eight domestic mine origins and moves in quantities amounting either to trainloads or substantial fractions of trainloads. The entire traffic, amounting to over 60 million net tons in 1957, is delivered at approximately 90 destinations where blast furnaces are located. By contrast, scrap iron moves from many points, 501 origins in a typical month. A study made by the Bethlehem Steel Company showed 263 origins, with individual plants receiving scrap from as many as 115 origins. Although the origin and destination points for iron ore are constant from year to year there are frequent changes in the origins from which particular mills obtain their scrap.
>
> The average weight per carload differs widely, iron ore loading in excess of 70 net tons and scrap to 50 net tons. While iron ore moves largely over single-line direct routes, scrap moves over a multiplicity of routes, some of which are extremely circuitous. Because iron ore is frequently delivered to the railroads in quantities in excess of trainloads, it does not require the very expensive terminal services involved in way train and classification-yard services which are characteristic of the movement of any commodity such as scrap, where the typical movement is a single carload. * * *

In these circumstances the Commission concluded that the mere fact that the revenue yield from one carload of scrap may be slightly higher than the revenue yield from one carload of ore does not establish rate discrimination. Moreover, the Commission concluded that comparison only on a per-car basis is misleading because scrap and iron ore are not interchangeable on a one-for-one basis in the steelmaking process. After analyzing the industrial process involved the Commission computed the transportation cost for one ton of scrap and the equivalent amount of

virgin raw materials, with the following results (App. 81):

Transportation cost[1] *of scrap*[2] *and comparable raw materials*[3]

	1966	1969	Present	With Ex Parte 281
Raw materials:				
With coking coal	$5.72	$6.67	$8.49	$8.87
With coke	5.80	7.15	8.62	9.03
Scrap	4.12	4.50	5.58	5.83
Difference:				
With coking coal	1.60	2.17	2.91	3.04
With coke	1.68	2.65	3.04	3.20

[1] Average revenue per ton.
[2] One ton of scrap iron or steel.
[3] Raw materials required to produce one ton of pig iron.

In other words, when compared with the virgin raw materials with which it actually competes in the steelmaking process, ferrous scrap already enjoys a rate advantage of more than $3.00 per ton, and that advantage is increased as a result of the Ex Parte 281 general increase.[13]

[13] Moreover, despite recent legislative attempts to tie the rail freight rate structure to costs (see, *e.g.*, S. 2842, 92d Cong., 1st Sess., which would have amended the Interstate Commerce Act to tie railroad rates to variable and fully allocated costs), railroad rates have never been based solely on costs, but rather are set by carrier management on the basis of a variety of factors. As this Court stated in *Northern Pacific Ry.* v. *North Dakota*, 236 U.S. 585, 598-599, a railroad "is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered—differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications." With respect to ferrous scrap *vis-a-vis* iron ore, other important transportation characteristics include the predictability, regularity and routinization of shipments, and the physical characteristics of handling the commodities.

We submit that, in its extensive consideration of the environmental consequences of the proposed general increase,[14] the Commission has complied with the requirements of NEPA. The agency has taken the requisite "hard look" at environmental factors in reaching its decision, and its conclusion that the proposed general increase will have no significant adverse effect on the environment was well within its discretion.

Moreover, even if it were assumed that the rate increase has environmental effects, there are two sides to the environmental picture—a matter carefully explored by the Commission but wholly ignored by the court below. The importance of additional revenue to the economic well-being of the railroads is evident. In addition, the Commission concluded, increased rail-

[14] In addition to the matters discussed above, the Commission's final impact statement also discussed in detail the remaining four NEPA criteria. It concluded, *inter alia*, that the general increase applicable to recyclables would not cause any unavoidable adverse environmental effect (App. 138–139), that, by guaranteeing the continuation of rail service, it will have a beneficial long-term effect (App. 157), and that it would not result in any irreversible and irretrievable commitments of resources (App. 157–158). The possible alternatives to the increase were considered in some detail, including the possibility of a holddown of rates on recyclables until the completion of Ex Parte 270 (App. 145–146), the use of selective increases on a commodity-by-commodity basis in lieu of general increases (App. 146–150), the imposition of a requirement that railroads reduce their costs (App. 150–151), the possibility of federal or state subsidies to railroads (App. 151) or "deregulation" of recyclables (App. 154–155), and expansion of government purchases of recyclables (App. 155–156), but concluded that there was "no warrant for deferring our actions in favor of any of them" (App. 157).

road revenues will produce collateral environmental benefits. For example, the railroads now face significant direct environmental costs which can be met only by sufficient revenue. The railroads spent $10 million per year in 1969 and 1970 on pollution control and devoted $55 million to capital improvements for environmental purposes between 1968 and 1970 (App. 58). Such expenditures can be made only if the railroads have sufficient revenues to meet the costs. Similarly, the threat of traffic diversion to trucks, or of non-movement of scrap, is in large part a factor of the railroads' inability to provide adequate service—a direct result of their inability to pay for capital improvements in roadbed, equipment, and the like. The history of this problem considerably antedates NEPA, and has been noted in a number of prior Commission decisions (see App. 58–65). To a large extent, it is a problem of adequate supply and utilization of freight cars (see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224), and it is the constant subject of legislative attempts to provide assistance to the railroads.[15] And, as Mr. Justice White graphically noted in concurring in a portion of this Court's prior opinion in this case (412 U.S. at 724), "failure to maintain this country's railroads even in their present anemic condition will guarantee that re-

[15] A recent example is S. 1149, 93d Cong., 1st Sess., a bill to provide government loan guarantees for the railroads' purchases of new freight cars, which was reported out of the Senate Committee on Commerce (S. Rep. No. 93–303, 93d Cong., 1st Sess.) and passed by the Senate.

cyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all."

Against this background the district court's criticisms do not show noncompliance with NEPA. There was no need for the Commission to "offer any rigorous price sensitivity studies of its own" (J.S. App. A, p. 31a) when the data it introduced indicated that the scrap market was not sensitive to rail rate increases of the magnitude involved here; there is no need for the Commission to duplicate the work of others, nor is it necessary to conduct additional studies merely because preliminary studies show no environmental effect. NEPA does not require the maximum possible effort to ferret out possible effects; it requires only a reasonable effort.

Nor is the statement defective because the district court found "defensive and advocatory language" (J.S. App. A, p. 29a). The "defensive" language to which the court objected was part of the Commission's response to comments that had criticized its analysis. This process of comment and response is integral to a demonstration that environmental effects were considered in the decision; surely, if it believes one of the protestants is wrong, the Commission is entitled to say so, and to say why.[16]

[16] Although the district court complained about the "attacks" in the impact statement on the views of those opposing the increase (J.S. App. A, p. 29a), it also complained that the Commission's final opinion does not "confront or even acknowledge the critical comments of other concerned agencies and environmental groups appended to the statement" (*id.* at 23a–24a). But see J.S. App. A, p. 31a. ("The Commission appended these comments to the back of its final statement and in some

3. *The District Court May Not Reject an Impact Statement Merely Because It Disagrees With the Statement's Conclusions*

Although the district court eschewed any "substantive" review of the Commission's conclusions (J.S. App. A, p. 22a), many of its criticisms of the impact statement are, at bottom, substantive. For example, the Court complained of the Commission's failure "to alter its draft impact statement in response to three of the critical comments * * *" (J.S. App. A, p. 31a). But the Commission would be required to "alter" its impact statement to meet criticism only if the critics were right and the Commission wrong. And the Commission would be required to conduct additional "price sensitivity studies of its own" (*ibid.*) only if it were wrong in concluding that the data before it indicates that the effect of rail prices is minimal. Indeed, the language of the impact statement may be viewed as "defensive" only if the court agrees with the critics rather than with the Commission's response that certain critics are "one-dimensional" or "naive" (App. 16).

In these respects, therefore, the district court's approach was basically substantive rather than procedural. And it is difficult to believe that the court would have ordered the Commission to reconsider if the Commission had concluded, on the basis of the same

instances made arguments against the criticisms within the body of this final statement.") There is, we submit, no legal basis for requiring the Commission's answers to environmental criticisms to be omitted from its impact statement and, instead, to be separately stated in an opinion.

impact statement, that environmental considerations required the rate increases on scrap to be disapproved, and the railroads had sought review. Indeed, the court suggested (J.S. App. A, pp. 37a–38a), presumably on the basis of the same statement and record on which the Commission here acted, that the Commission should have prohibited the scrap rate increases altogether until it completed its investigation (now proceeding in Ex Parte 270) of the entire railroad rate structure. But under Section 15(7) the Commission could not order such a moratorium unless it were convinced that the proposed rates were *not* just and reasonable. It is therefore apparent that the district court, rather than finding a lack of evidence to support the Commission's position, has weighed the evidence *de novo* and concluded that environmental factors justified indefinite postponement of the rate increases.

This scope of substantive review is improper under the decisions of this Court. The Commission's evaluation of the evidence, and its choice of methodology for gathering sufficient evidence, should not be set aside where, as here, it is "rationally supported." *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 749. NEPA does not create a different scope of judicial review of Commission determinations; NEPA merely requires the Commission to make additional determinations which are subject to review under the ordinary standards. A thoughtful analysis of the relation of NEPA to the scope of review of Commission decisions was penned by Judge Friendly for the court in *City*

of New York v. *United States, supra,* 344 F. Supp. at 939–940:

> Normally, of course, judicial review of the merits of an ICC abandonment order is governed by the standards expressed in § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 [citations omitted], and thus is generally limited to determining, in essence, whether the Commission's findings and conclusions are supported by substantial evidence and are not an abuse of discretion. We seriously doubt, however, that the merits of the Commission's determinations under NEPA are subject to even that degree of review. NEPA itself contains no requirement that an agency hold hearings to investigate the environmental consequences of the proposed action, and does not specify that findings are necessarily to be made. Moreover, NEPA is often applicable to agency decision making where adjudicatory proceedings are not required. [Citations omitted.] No formal record is contemplated in such situations and the function of the courts is thus necessarily limited. [Citation omitted.] To ensure implementation of the national environmental policy, see NEPA § 101, 42 U.S.C. § 4331, procedures were prescribed in § 102(2) to compel administrative exploration and consideration of environmental consequences. *Once it is determined in any particular instance that there has been good faith compliance with those procedures, we seriously question whether much remains for a reviewing court.* In this vein, it has been suggested that "reviewing courts probably cannot reverse a substantive decision on its merits, under [NEPA], unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental factors." *Calvert Cliffs', supra,* 449 F. 2d 1115 [footnotes omitted; emphasis added].

We submit that this is the correct approach, and that the district court here has exceeded the scope of review open to it.[17] See, *e.g., Louisiana* v. *Federal Power Commission, supra; Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275 (C.A. 9); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg,* 463 F.2d 783 (C.A.D.C.); *Upper Pecos Association* v. *Stans, supra.*

II. THE DISTRICT COURT IMPROPERLY INTERFERED WITH THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDING IN WHICH TO CONSIDER THE BASIC RATE STRUCTURE

In addition to the district court's criticisms of the impact statement discussed *supra,* the court also leveled two procedural criticisms. The court held, first, that the Commission was required, in a general revenue proceeding, to analyze the environmental effects of the entire railroad rate structure, and, second, that the Commission was required to recommence the entire review procedure after drafting an impact statement adequate in the eyes of the court. We address

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[17] Indeed, some courts have confined review of impact statements to whether the agency made "an objective good faith effort to comply with the statutory procedural requirements." *National Helium Corp.* v. *Morton,* 486 F.2d 995, 1001 (C.A. 10), certiorari denied, 416 U.S. 993. See also, *Hiram Clarke Civic Club, Inc.* v. *Lynn,* 476 F.2d 421, 425 (C.A. 5).

the first of these holdings here and the second in point III, *infra.*

A. NEPA DOES NOT TAKE AWAY THE COMMISSION'S DISCRETION TO DETERMINE THE APPROPRIATE PROCEEDINGS IN WHICH TO CONSIDER PARTICULAR ISSUES

The Commission's final impact statement showed that the Commission here "made an examination of the presently effective railroad rate structure" (App. 26) and determined that "[t]he present rate structure * * * does not, in our opinion, unduly hamper the free flow of [recyclable] materials * * * " (App. 152). In support of this conclusion the Commission examined waybill samples, costs and technologies in the scrap and competing virgin-source industries, manufacturing techniques, pricing factors, volume of movements, transportation costs and characteristics, carrier revenue needs, and alternatives to the increases (App. 44–46, 53–55, 70–82, 91, 94, 104, 106, 113–116, 150–157, 190–191). We submit that this inquiry into the effect of the underlying rate structure was entirely sufficient for purposes of the peculiarly limited issues to be decided by the Commission in a general revenue proceeding. See pp. 18–35, *supra,* and pp. 43–46, *infra.*

The district court, however, held that the impact statement's "most fundamental and important deficiency" (J.S. App. A, p. 34a) was "the limitation of its analysis to the marginal impact of the most recent rate increase with no discussion of whether the underlying rate structure itself significantly affects the environment" (*ibid.*). Thus, by effectively prohibiting the Commission from approving a general rate increase

until it has conducted a complete analysis of the underlying rate structure, the district court's holding would force the Commission either to abandon general revenue proceedings altogether (notwithstanding the statutory authorization of such proceedings in Section 15(7)) or to consider in them matters more appropriately at issue in proceedings such as Ex Parte 270, the Commission's current investigation of the entire rate structure. In so holding, the district court, in our view, acted contrary to this Court's previous admonition in this case that "NEPA was not intended to repeal by implication any other statute" (412 U.S. at 694).

The decision to approve a general rate increase before definitively resolving all questions relating to a possible need for restructuring the rail freight rate system was, we submit, plainly within the Commission's discretion. As this Court definitively held in *American Lines* v. *Louisville & Nashville R. Co.,* 392 U.S. 571, 592, the Commission must be left with reasonable latitude to decide in what kinds of proceedings it will address complex rate questions:

> Given the fact that * * * the Commission was to exercise its informed judgment in ultimately determining what method of costing was preferable, it is clear that the District Court also erred in refusing to permit the Commission to exercise that judgment in a proceeding it reasonably believed would provide the most adequate record for the resolution of the problems involved. We can see no justification for denying the Commission reasonable latitude to decide

where it will resolve these complex issues, in addition to how it will resolve them. The action by the District Court here not only deprives the Commission of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context.

This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by producers for a period of 2½ years after the setting of the area rate. *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). The basis for this holding was the principle that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *Id.,* at 776. That principle is equally applicable to rate regulation carried out by the ICC, especially where, as here, the determination made on an interim basis is in general accord with both the legislative history of the statute involved and the results in prior cases decided by the agency.

See, also, *Wichita Board of Trade, supra,* 412 U.S. at 819–821.

Nothing in the language, legislative history, or purpose of NEPA removes from the Commission this "reasonable latitude to decide where it will resolve * * * complex issues, in addition to how it will resolve them." Indeed, the courts have generally recognized that NEPA does not take away the discretion

of an agency to determine in what proceeding it should address a particular question. For example, in *Sierra Club* v. *Callaway* (*Trinity River*), 499 F. 2d 982, the Fifth Circuit held that it was improper for the district court to compel an agency to analyze a series of construction projects in a single impact statement, rather than one project per statement. The Second Circuit, in *Ecology Action* v. *Atomic Energy Commission,* 492 F. 2d 998, 1002, held that the Atomic Energy Commission was entitled to develop definitive reactor safety criteria in a consolidated proceeding while continuing to license particular reactors. Accord, *Union of Concerned Scientists* v. *Atomic Energy Commission,* 499 F. 2d 1069, 1082–1085 (C.A.D.C.). And in *Jicarilla Apache Tribe of Indians, supra,* the Ninth Circuit allowed the Department of the Interior to proceed with consideration of particular dam projects prior to the completion of the long-range Southwest Energy Study, pointing out that if the courts were "to impose a requirement that an impact statement can never be prepared until all relevant environmental effects were known, it is doubtful that any project could ever be initiated" (471 F. 2d at 1280). See also *Life of the Land* v. *Brinegar, supra; Environmental Defense Fund, Inc.* v. *Armstrong,* 356 F. Supp. 131, 139 (N.D. Cal.).

B. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN DECIDING TO CONSIDER THE OVERALL EFFECTS OF THE RATE STRUCTURE IN EX PARTE 270 RATHER THAN IN EX PARTE 281

The principal reason given by the district court for requiring the Commission to undertake a full survey of the rate structure was that an across-the-board

increase will "presumptively aggravate" environmental problems if the underlying rate structure "contributes to the degradation of our environment" (J.S. App. A, pp. 34a–35a). This, however, begs the important question whether the underlying rate structure does so discriminate.[18] The Commission examined the evidence on a preliminary basis and concluded that it does not (see pp. 32, 40, *supra*). It was improper for the district court, on the basis of an unsupported suspicion that more evidence might prove the Commission wrong, to order the Commission to create that additional evidence and to postpone the rate increases until it had done so. The Commission's decision to allocate to Ex Parte 270 the gathering of that additional evidence should be sustained unless arbitrary or capricious—and the Commission's preliminary determination that the basic rate structure was not seriously defective was sufficient under that standard.

As explained *supra,* pp. 21–22, in general revenue proceedings the Commission determines whether the carriers' collective revenue needs require a rate increase in order to provide them with adequate rates of return and to provide the Nation with adequate transportation. If the carriers demonstrate that such relief is consistent with the public interest the Commission will permit them to file tariffs to generate the needed

[18] In any event, an across-the-board percentage increase in freight rates which does not exceed the percentage increase in other costs caused by inflation would not "aggravate" any existing disparity. And here the Commission's decision to limit price increases on nonferrous scrap to three percent tended to improve its position vis-a-vis virgin materials.

revenue. But in this sort of proceeding the Commission does not determine the reasonableness of any particular rate, nor does it consider the rate relationships of one commodity class to another—or even the revenue needs of a particular railroad (J.S. App. D, pp. 16d–17d). The procedure is expeditious and effective to ameliorate a revenue deficit precisely because it does *not* involve consideration of all possible variables. If the Commission were compelled to increase the number of different disputes that must be resolved in every general revenue proceeding, it would be unable to complete its work in the seven months allowed by Section 15(7). The Commission's current study of the entire rate structure, Ex Parte 270, *Investigation of Railroad Freight Rate Structure,* was commenced in 1970 and is still some years from completion. It has only recently produced an environmental impact statement, served August 2, 1974, in Sub-Nos. 5 and 6, concerning iron ores and scrap iron and steel. This impact statement alone consumes 313 pages and was produced only with the help of a special appropriation from Congress, a "special counsel" and staff devoted to this single task, and, for only the second time in the Commission's history, the appointment of a Commissioner as "Coordinator" in charge of the proceeding. Additional impact statements are forthcoming.

It was thus entirely appropriate for the Commission to conclude, in Ex Parte 281, that it would confine most of its attention to the marginal effects of the rate increases, while leaving to Ex Parte 270 the full

study that is required from time to time. It would be impractical for the Commission to attempt to duplicate, in every general revenue proceeding, the effort expended in Ex Parte 270;[19] nor would it be proper for the Commission to impose on the financially hard-pressed railroads a "moratorium" on rate increases until Ex Parte 270 is completed. The requirement of such a moratorium here not only would be inconsistent with the Commission's discretion to determine the appropriate proceeding in which to consider a particular issue, but it would be contrary to Section 15(7), which provides that rate increases become effective unless the Commission affirmatively declares them unlawful. Cf. *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, 487 F. 2d 865 (C.A. 2).

In sum, there was no warrant for the district court's order to the Commission to reexamine the railroad rate structure in Ex Parte 281. It interfered with discretion reserved to the Commission and, if required, would virtually nullify the Commission's authority to entertain general revenue proceedings.

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[19] Nor would it necessarily be desirable for the Commission thoroughly to reexamine the rate structure on every available occasion. Most governmental decisions are made at the margin, partly for the very practical reason that governments do not operate on the maximum conceivable information, but on an amount that usefully can be generated and used in the time available and at reasonable cost. See generally Lindblom, *The Science of "Muddling Through,"* 19 Pub. Admin. Rev. 79 (1959).

III. THE COMMISSION WAS NOT REQUIRED TO CONDUCT ORAL HEARINGS AFTER PUBLICATION OF THE IMPACT STATEMENT

The district court held that, because Section 102(2)(C) of NEPA provides that the environmental impact statement "shall accompany the proposal through the existing agency review processes," there is a "strong presumption" that the Commission was required, before reaching a decision, to conduct additional oral hearings after it had issued a draft impact statement, received comments, and settled on a final impact statement. See J.S. App. A, pp. 42a–43a.

A. GENERAL REVENUE PROCEEDINGS ARE RULEMAKING PROCEEDINGS AND REQUIRE NO ORAL HEARINGS

The requirement in Section 102(2)(C) that the impact statement "accompany" the agency's "proposal" through the "existing" agency stages of "review" does not support the district court's conclusion here. Because of the nature of the Commission's general revenue proceedings, the agency itself makes no "proposal" for action, and it conducts no intra-agency "review" of an initial decision. This provision of NEPA has obvious application to situations where an agency publishes a proposal for federal action and then holds public hearings on the proposal it has published. And the requirement that the impact statement "accompany" the "proposal" through existing review procedures can also reasonably be applied to situations where an agency has two tiers of review, with a hearing examiner making an initial decision,

and the agency hearing appeals. It is from the latter paradigm that the district court drew its analogies. In *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission,* 449 F. 2d 1109 (C.A.D.C.); *Greene County Planning Board* v. *Federal Power Commission,* 455 F. 2d 412 (C.A. 2), certiorari denied, 409 U.S. 849; and *Harlem Valley Transportation Association* v. *Stafford,* 500 F. 2d 328 (C.A. 2), courts have required agencies that employ administrative law judges to make an initial decision in an adjudicative proceeding to prepare an environmental impact statement before the first hearings are held, so that the impact statement can "accompany" other papers through the existing "review" process.

However suitable this procedure may be in such two-stage administrative proceedings, it has no proper application to the Commission's general revenue proceedings. These proceedings do not involve intra-agency review within the scope of Section 102(2)(C). In a Section 15(7) general revenue proceeding the initial and only agency decision is made by the Commission itself. There are no intermediate agency decision makers, nor are there any agency "review" procedures. In the absence of such procedures, we submit, there was no violation of NEPA, which expressly refers to "existing" review procedures and does not compel the Commission to create new levels or stages of intra-agency review.

This conclusion follows from the fact that general revenue proceedings under Section 15(7) are rulemaking, conducted pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. 553. Such proceedings do not require oral hearings or intermediate stages of agency review. *United States* v. *Florida East Coast Ry. Co., supra,* 410 U.S. at 236–238; *United States* v. *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 756–758. Cf. Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking,* 87 Harv. L. Rev. 782, 790–796 (1974).

Nor is there any independent requirement in NEPA that an agency hold hearings on environmental issues. It need do so only if such hearings are part of the "existing" process of "review." See *City of New York* v. *United States, supra,* 344 F. Supp. at 939–940. As the Ninth Circuit has explained:

> To hold in the abstract that meaningful public participation in the NEPA process cannot exist unless public hearings are held subsequent to the issuance of a draft environmental impact statement and prior to the preparation of the final document would be to substitute our judgment for that of Congress. It is true that the legislative history of NEPA indicates that the desire for a greater degree of responsiveness by administrative decision makers was one factor in the passage of NEPA. Despite this concern, however, there is no express provision in NEPA requiring administrative hearings as a procedural step in the preparation of § 102(2)(C) environmental impact statements. [*Jicarilla Apache Tribe of Indians, supra,* 471 F. 2d at 1286; footnote omitted.]

The district court's suggestion (J.S. App. A, p. 42a) that oral hearings are *de facto* part of the Commis-

sion's "existing" review procedure in general revenue proceedings is incorrect. Oral hearings—which are most useful for cross-examination or the development of facts or issues that cannot be exposed adequately in writing—often are useful for some issues in a particular case but not for other issues. The Commission frequently limits oral hearings in a particular case to specific issues, and, indeed, a majority of all Section 15(7) proceedings involving rate proposals are handled with no oral hearings at all.[20] There is nothing peculiar to environmental issues that makes them unsuitable for written presentation. The most persuasive environmental arguments tend to be in the form of complicated data that is quite unsuitable for oral presentation. Accordingly, even though an oral hearing was held at an earlier stage of this case, there is no basis for requiring the Commission to hold additional oral hearings concerning the environmental impact statement on the ground that such hearings are a regular part of the Commission's "existing" process of "review" in such cases.[21]

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[20] Of all Commission proceedings under Section 15(7) during calendar 1973, there were oral hearings in 55 and no hearings in 123 cases. Of more recent general revenue proceedings oral hearings have been allowed as follows: Ex Parte 295—limited hearings for cross-examination; Ex Parte 299—unlimited oral hearings; Ex Parte 303—no hearings; Ex Parte 305—no hearings.

[21] Moreover, all interested persons and protestants had an opportunity at the hearings held on June 15 and 16, 1972, to make oral presentations concerning potential environmental effects.

B. THE COMMISSION MAY CONSIDER ENVIRONMENTAL EFFECTS WITHOUT "STARTING AGAIN"

Once it is concluded that the Commission is not required to hold oral hearings on an impact statement, the foundation for the district court's directive (J.S. App. A, pp. 24a–25a) to the Commission to start its proceedings from the beginning vanishes. Because general revenue proceedings are rulemaking, the only apparent "beginning" to which the Commission could return here would be an oral hearing.

Even if there was another relevant "starting point" to which the Commission could return, it was unnecessary for it to do so. The Commission's impact statement, which we have demonstrated *supra* was adequate, concluded that there were no significant environmental consequences of the across-the-board increase. It would be extravagantly wasteful, and unfair to the parties, for the Commission to begin its proceedings over again in light of its discovery that there were no serious environmental effects.

A requirement to begin "over again" can be meaningful only if it would inject into the "early" stages of the Commission's consideration factors that previously were missing and might affect the outcome. The record here discloses that environmental possibilities were in fact considered at the earliest possible stages, from the time the Commission required the railroads to submit their own impact statement, through the Commission's first impact statement, through extensive consideration in the Commission's

decision of October 4, 1972. And because the Commission ultimately concluded that environmental effects were minimal, their more extensive consideration at an earlier stage could not have affected the outcome.

Finally, we submit that, even if there are technical defects in the Commission's compliance with NEPA, the extensive environmental inquiry conducted by the Commission constituted a good faith, integrated consideration of environmental effects along with the other pertinent considerations. In these circumstances technical defects in the impact statement itself do not disable the agency from rendering a valid final decision. See, *e.g., Life of the Land* v. *Brinegar,* 485 F. 2d 460 (C.A. 9), certiorari denied, 416 U.S. 961 (impact statement circulated after hearing, but extensive environmental inquiry before hearing); *Jicarilla Apache Tribe of Indians, supra; City of New York, supra; Hanly* v. *Kleindienst,* 471 F. 2d 823, 836 (C.A. 2), certiorari denied, 412 U.S. 908 (public participation in agency's environmental considerations).

In sum the Commission in this case, after taking an extended hard look at the pertinent environmental possibilities, and after issuing two impact statements, concluded that it had no cause to prohibit the railroads from increasing the transportation cost of scrap as well as the cost of virgin materials. The Commission's consideration of environmental effects, while undoubtedly not perfect, was, we submit, completely adequate to meet the requirements of NEPA.

CONCLUSION

For the foregoing reasons the district court's judgment should be reversed and the case remanded with directions to dismiss the complaint.

Respectfully submitted.

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DECEMBER 1974.

APPENDIX

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after

it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accuate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 102 of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332 provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

> (A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality * * *, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact

involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * * * *

COMMISSION'S SPECIAL ENVIRONMENTAL RULES, 49 C.F.R. 1100.250, 340 I.C.C. 431, PROMULGATED PURSUANT TO 42 U.S.C. 4332(2)(B), PROVIDE:

SPECIAL RULES PERTAINING TO ALL PROCEEDINGS BEFORE THE COMMISSION TO INSURE THAT ENVIRONMENTAL AMENITIES AND VALUES ARE GIVEN APPROPRIATE CONSIDERATION

(a) *Scope of special rules.* These special rules are applicable to all proceedings before the Commission. They are intended to assist the Commission in discharging its duties under the National Environmental Policy Act of 1969 (Public Law 91–190, 83 Stat. 852) which authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection of the environment declared in that act.

(b) *Detailed environmental statement.* (1) It shall be the general policy of the Interstate Commerce Commission to adopt and adhere to the objectives and

aims of the National Environmental Policy Act in performing its regulatory duties and powers under the Interstate Commerce Act and related statutes. Among other things, the National Environmental Policy Act requires, to the fullest extent possible, a detailed environmental statement in all reports and recommendations on legislative proposals and other major Federal actions which will significantly affect the quality of the human environment.

(2) In compliance with this requirement, a detailed environment statement will be made when the regulatory action taken by the Commission under the applicable statutes will have such a significant environmental impact. The detailed statement, which statement shall be made as part of the initial decision in the proceeding and shall become final (with or without modification) when a final decision or order is entered by the Commission, shall fully develop the five factors listed below, among other relevant factors including the justification of a proposed action as compared to its alternatives. The following factors are listed merely to illustrate the kinds of values that *must* be considered in the statement, and in no respect is this listing to be construed as covering all factors relevant to the disposition of any particular proceeding:

(i) The environmental impact of the requested action;

(ii) Any adverse environmental effects which cannot be avoided should the requested action be granted;

(iii) Alternatives to the requested action;

(iv) The relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

(v) Any irreversible and irretrievable commitments of resources which would be involved in the requested action should it be granted.

The procedures set forth in this rule are intended to encourage, to the fullest extent possible, public and governmental participation in those formal proceedings which might significantly affect the quality of the human environment, and to the end of insuring that a complete record is developed which will enable the Commission to consider fully the environmental impact of a contemplated action.

(c) *Applicable general and special rules not affected.* The Commission's general and/or special rules heretofore applicable to a proceeding shall remain in effect and govern the procedure therein. These special rules shall supplement the applicable existing rules.

(d) *Papers to show effect of subject matter of proceeding on the quality of human environment.* (1) In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present, the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in paragraph (b)(2)(i)–(v) of this section.

(e) *Notice to appropriate governmental agencies.* (1) All papers submitted in compliance with these rules, and affirmatively alleging a substantial environmental impact, beneficial or adverse, shall be served by the person or persons submitting it on those governmental bodies given notice pursuant to subparagraph (1) of this paragraph. The person or persons submitting the statement also shall supply 10 copies of

the statement to the Council on Environmental Quality.

(2) A notice of all proceedings determined to have a significant effect on the quality of the human environment will be transmitted by the Commission as promptly as possible to the Council on Environmental Quality and to appropriate governmental bodies—Federal, regional, State, and local—(as identified in the guidelines promulgated by the Council on Environmental Quality) with a request for public comments on the environmental considerations listed in paragraph (b)(2)(i)–(v) of this section.

(3) All interveners, including other Government agencies, taking a position on environmental matters shall file with the Commission an explanation of their environmental position, specifying any differences with the original party's detailed statement upon whichintervener wishes to make its views known, and including therein a discussion of that position in the context of the factors enumerated in paragraph (b) of this section. All interveners shall be responsible for filing 10 copies of their submission with the Council on Environmental Quality at the time they file with the Commission and shall also supply a copy of such submission to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statement. The Commission will consider all representations submitted prior to the final disposition of the proceeding.

(4) The views of the Council on Environmental Quality, if any, should be made in a written statement served upon the Secretary of the Commission and all parties of record.

(f) *Official notice.* The Commission may take official notice of any facts relating to the environmental situations before it. This shall include, but not be limited

to, scientific studies, governmental reports, and maps which have not been presented in evidence by any of the parties of record.

(g) *Determinations.* The determinations in all proceedings which investigate environmental issues should include an evaluation of the environmental factors enumerated in paragraph (b)(2)(i)–(v) of this section, and the views expressed in conjunction therewith by all persons making formal comment pursuant to the provisions of this section. Specific findings should be made in each such proceeding as to whether the relief sought is or is not environmentally advantageous.

(h) *Review of initial decision on environmental impact.* Any decision with respect to the environmental issue will be subject to Commission review in the same manner as other issues in the proceeding.

(i) *Proceedings in progress.* With respect to those proceedings already in progress, the Commission recognizes that it may not be possible to comply fully with the procedures outlined herein and, in particular, that it may not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings already in progress.

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No. 73-1971

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.), ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF

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1. The appellees—Students Challenging Regulatory Agency Procedures, *et al.* (SCRAP), National Association of Recycling Industries, *et al.* (NARI), and Institute of Scrap Iron and Steel, Inc. (ISIS)—contend that there is no jurisdiction over this direct appeal from the final order of a three-judge court setting aside an order of the Interstate Commerce Commission. We have addressed this contention in our memorandum in opposition to the motions to dismiss, and rely upon our analysis there. Because the district court set aside an order of the Commission, jurisdiction is conferred by 28 U.S.C. 1253 in conjunction with the Urgent Deficiencies Act of 1913, as carried forward into 28 U.S.C. 2321-2325.

Appellees' argument that the district court entered no more than a declaratory judgment is inaccurate, in addition to being (in our view) irrelevant. The court's judgment (J.S. App. B, p. 2b) "vacated" the orders of the Commission and "ordered" the Commission to conduct "further proceedings consistent with the opinion in this case." The opinion required the Commission to prepare a new impact statement and reopen Ex Parte 281 (J.S. App. A, pp. 39a-41a). This language is mandatory, and it is therefore not controlling (for jurisdictional purposes) that the district court declined appellees' additional request for an injunction against the collection of the increased rates.[1]

2. In addition to the issue of appellate jurisdiction, there is another issue concerning the original jurisdiction of the district court. The appellant railroads argue that the Commission's general revenue proceedings are immune from judicial review; the appellees take the contrary position, contending that the district court correctly held that it had jurisdiction in this case. Both sides have cited and discussed the views expressed by the United States and the Commission in prior cases in this Court raising similar questions.[2] We adhere to those views; accordingly, we have not contested and do not challenge now the jurisdiction of the district court.

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[1]Appellees contend that the only consequence of the district court's order is a change in the burden of proof in future proceedings challenging the rates established. This would be the consequence of the part of the judgment vacating the Commission's order. But if the Commission conducted the "further proceedings" directed by the judgment, it would enter a fresh decision with respect to the rates, and the change in the burden of proof applies only during the pendency of the proceedings until the new order is entered.

[2]*Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (S.D. N.Y.), and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C.), both affirmed by an equally divided Court, 400 U.S. 73; *Electronic Industries Ass'n* v. *United States*, 310 F. Supp. 1286 (D. D.C.), affirmed, 401 U.S. 967.

The position taken by the United States and the Commission in the cases cited in note 2, *supra*, is basically this: There is nothing inherently unreviewable about a general revenue order of the Commission authorizing general rate increases after proceedings under 49 U.S.C. 15(7). Therefore, the order is reviewable to the extent that it reflects final administrative decisions. Upon issuance of the order, the Section 15(7) proceedings are complete; consideration of detailed questions about particular rates, however, must await the institution of new proceedings under Section 15(1) by the filing of specific complaints with the Commission under Section 13 (49 U.S.C. 15(1), 13).

Thus, when the challenge to a general revenue order of the Commission focussed solely on particular rates for particular commodities, we have argued[3] that judicial review is unavailable because these are matters the Commission did not finally decide in the Section 15(7) proceedings, and because other remedies (such as a complaint under Section 13) are available. On the other hand, when a general revenue order was challenged on the basis that the Commission erred in determining that the railroads' revenue needs warranted a general increase, we have argued in favor of direct judicial review, because in regard to this matter the Commission had made a final determination.[4]

---

[3]See Motion to Affirm and Supplemental Memorandum for the United States and the Interstate Commerce Commission in *Electronic Industries Ass'n* v. *United States*, *supra* (No. 423, October Term, 1970).

[4]See Brief for United States, the Secretary of Agriculture and the Interstate Commerce Commission in *Atlantic City Electric Co.*, *supra*, and *Alabama Power Co.*, *supra* (Nos. 78 and 106, October Term, 1970), at pp. 18-22.

In this case, appellees broadly attacked the Commission's general revenue order on the basis that the accompanying final environmental impact statement was inadequate. Appellees argued, and the court below held, that the Commission should have considered, in addition to the effect of the general rate increases, "whether the underlying rate structure itself significantly affects the environment" (J.S. App. A, p. 34a). In regard to these matters, the Commission made a decision that was final when issued, and no other forum would appear to be appropriate for a review of the Commission's determinations. This case is therefore analogous to one in which the challenge is directed to the Commission's determination of the railroads' revenue needs, particularly since appellees here alleged the need for an environmental analysis of the entire rate structure. Accordingly, there is no bar to immediate judicial review. While we believe that the appellees' attack is unfounded, the lack of merit in their challenge did not, of course, deprive the district court of jurisdiction to consider their allegations. See *Bell* v. *Hood*, 327 U.S. 678.

3. Appellees SCRAP and ISIS contend that the adequacy of an impact statement must be reviewed under 5 U.S.C. 706(2)(D), which provides that a reviewing court may set aside agency action found to be "without observance of procedure required by law," instead of under the standards we have suggested in our brief.[5] This is a false dichotomy; the problem does not require an "either/or" solution. Each of the standards set out in Section 706(2) is applicable to judicial review of every action of the Commission. *Bowman Transportation, Inc.*

[5] *Lathan* v. *Brinegar*, 506 F.2d 677, 693 (C.A. 9) (*en banc*), held that review under Section 706(2)(D) is appropriate "because NEPA is essentially a procedural statute."

v. *Arkansas-Best Freight System, Inc.*, No. 73-1055, decided December 23, 1974, slip op. 3.

However, review under the standards of Section 706(2)(D) is of little help to appellees because the Commission followed all of the procedures required by NEPA. As we argued in our opening brief, pp. 40-52, the Commission was entitled to allocate to Ex Parte 270 the full investigation of the rate structure, and did not transgress the commands of NEPA by declining to hold an additional oral hearing after it had circulated its draft impact statement.[6] All that remains for review under Section 706(2)(D) is the content of the impact statement. We submit that, if the Commission issues an environmental impact statement on a timely basis, and considers in good faith all of the elements specified in Section 102(2)(C), there has been full compliance (for purposes of Section 706(2)(D)) with the "procedure" established by NEPA. More detailed challenges to the scope of the Commission's environmental analysis, including appellees' claims that additional studies should have been conducted and additional data gathered, simply are not procedural problems, and they more appropriately may be the subject of challenge under the other standards established by Section 706(2).

4. While appellees seek to wage a general (and basically substantive) campaign against the actions of the Commission, they also contend that this Court's review of the conclusions of the district court is limited to setting aside district court conclusions that are "clearly

[6] Even if the Commission's compliance with these procedural steps was less than adequate, not all procedural errors require a reviewing court to set aside the agency's action. Section 706 provides that "due account shall be taken of the rule of prejudicial error." As we contended in our brief, environmental considerations so pervaded Ex Parte 281 that any particular shortcomings in compliance with NEPA procedures did not prevent full and fair considerations of environmental concerns.

erroneous" (ISIS Br. 20-23; SCRAP Br. 45-48). This is an inversion of the correct standard of review.

The conclusions and procedures of the Commission are presumptively correct; the Commission's decisions may be set aside only if the reviewing court can adequately justify such action. *United States* v. *Louisville & Nashville R.R. Co.*, 235 U.S. 314, 320-321; *Bowman Transportation, supra,* slip op. at 4, 10-12. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416. The Commission's decision, rather than that of the district court, is entitled to deference.

The "clearly erroneous" limitation of Fed. R. Civ. P. 52(a), on the other hand, applies only to "findings of fact," not to conclusions of law. When reviewing agency action under Section 706(2) of the Administrative Procedure Act, the district court ordinarily takes no evidence and makes no findings of fact. In the instant case the record before the district court consisted of the record before the Commission and the Commission's reports and conclusions. Any facts "found" were found by the Commission; the district court's function was to review the record and procedures and decide whether, under applicable legal principles, the Commission's actions must be set aside. This function is a purely legal one, and the district court's conclusions are entitled on review to no deference other than that warranted by the force of its reasoning.[7]

5. We have no quarrel with most of the substantive legal propositions of appellees. Under Section 102(2)(C) of NEPA an agency is required to make a good faith effort to analyze the relevant environmental considerations, issue an impact statement presenting these considerations as early as possible during the agency's prodeeding, and take those considerations into account during the

[7]Nor was any deference to the district court's conclusions shown in the recent decision in *Bowman Transportation, supra.*

agency's review process. The Commission's special environmental rules so provide (Br. App. 58-62), as do the guidelines of the Council on Environmental Quality, 40 C.F.R. Part 1500. We agree that the Commission should, in accordance with NEPA and principles established in the lower federal courts, comply with the impact statment requirement to the fullest extent possible, consider environmental factors at all stages of the agency proceeding, and use all practicable means to further the policies and objectives of the Act.

The translation of these general requirements into specific procedures also depends in part on the nature of the function performed by the Commission and the type of decision under consideration. We have argued in our opening brief that general revenue proceedings of the Commission are not typical of the environmental decisions to which NEPA usually applies, and that the Commission's performance of its environmental duties in this case, given the short time available under Section 15(7) of the Interstate Commerce Act and the broad and "general" nature of a general revenue proceeding, adequately fulfilled NEPA's requirements. We add to that discussion only by addressing appellees' (particularly appellee SCRAP, in their brief at 10-13, 57-64) argument that the Commission's subsequently-issued impact statements in Ex Parte 270 and 295 demonstrate the inadequacy of the impact statement in Ex Parte 281.

Since the draft impact statement in this case was released in March 1973, the Commission has continued to accumulate expertise in evaluating the environmental effects of railroad rate changes. Some ongoing studies have begun to produce results, and more quantification of the size of the environmental effect is possible. But it is altogether natural that this should occur, and the accumulation of this body of knowledge, and its employment in more recent impact statements, is not an objection to the adequacy of the environmental consideration in Ex Parte 281. The only question open in this case is

whether the environmental consideration in Ex Parte 281 was adequate in light of the time available for its completion and the environmental data that was known to, or reasonably could have been gathered by, the Commission. That the Commission now has developed the capacity to make more comprehensive estimates of the environmental effects of its rate decisions does not affect our argument that its environmental consideration in Ex Parte 281 fulfilled the commands of NEPA.

The Commission is not required to reopen a general revenue proceeding (once it has been concluded) simply because additional environmental data has come to light, any more than it would be required to reopen such a proceeding if additional estimates of the revenue impact of the change, or the fiscal needs of the railroads, became available. The approval of the general rate increase reflects the Commission's considered judgment that, on the evidence known to it, an increase is not illegal. Subsequently-discovered information can be utilized in subsequent general revenue proceedings, and could affect the Commission's action at that time. It might appropriately be introduced as well in a proceeding challenging the reasonableness of a particular rate. Either of these alternatives would be more in keeping with the nature of general revenue proceedings and with the demands of efficient administration.

But however that may be, the quantification provided in the environmental impact statements in Ex Parte 270 (Sub-Nos. 5 and 6) and Ex Parte 295 (Sub-No. 1) does not impeach the basic conclusions the Commission reached in Ex Parte 281. Both of the more recent impact statements concluded that the environmental effects of small rate increases on recyclables, taking place at the same time

as small rate increases on virgin materials,[8] will be "negligible" or "insignificant."[9] Each impact statement concludes that the results of small rate changes are so small that less than a few tenths of one percent of the scrap movements will be affected (see, *e.g.*, impact statement in Ex Parte 295, Sub-No. 1, at xiv). The more recent analyses therefore support rather than contradict the Commission's earlier analysis, and confirm the accuracy of the impact statement in Ex Parte 281.

Finally, to the extent the more recent studies undermine in any particular the Commission's earlier conclusions, the data they reveal can be the basis for new decisions in present or future general revenue proceedings, and rates can be adjusted to take full account of the newly-disclosed facts. Such a procedure is ongoing in Ex Parte 270 and, as we argued in our brief, the Commission was entitled to allocate to that proceeding,

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[8]Although an increase in the freight rates for scrap will raise the delivered price of scrap and therefore make it "less attractive," it is inaccurate for appellees to suggest that this demonstrates a significant environmental impact. If a simultaneous increase in the freight rate for virgin materials takes place, scrap will not be relatively disadvantaged, and there will not be any incentive to shift from use of scrap to use of virgin materials, unless an across-the-board increase greater than the level of inflation in the price of the commodities is added to a freight rate structure biased against scrap. But there is no evidence of such a bias (see Br. at 30-32), let alone of a bias aggravated by an increase greater than the rate of increase in the prices of the commodities. The Commission therefore was entitled to conclude that an across-the-board increase would not have a significant environmental impact, while at the same time concluding that a hold-down on the increases for non-ferrous scrap would, by making such scrap relatively more attractive, be environmentally beneficial (cf. SCRAP Br. 52-55). This analysis, and that at pp. 30-32 of our brief, also refutes appellee NARI's contention (at pp. 5-9) that rate increases have produced relative discrimination against non-ferrous scrap.

[9]At p. i of each document.

rather than to particular general revenue proceedings, the full environmental investigation of the basic rates charged by America's railroads.[10]

Respectfully submitted.

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General Counsel,
Interstate Commerce Commission.

MARCH 1975.

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[10]Appellee NARI contends (Br. 51-52) that the Commission "has not embarked upon any investigation of the rate structure for these basic recyclable solid waste materials * * *." Although the Commission denied NARI's request for a separate investigation of non-ferrous scrap, the rates for such scrap *are* under study in Ex Parte 270 (SPC Group Nos. 119-122, main docket) as part of the investigation into all rates and charges by the railroads. The denial of NARI's request meant only that there would not be a separate sub-numbered investigation of such scrap; separate sub-numbered investigations have been confined to a few of the most important commodity groups such as iron ore and steel, coal, wood, and the like. Counsel for NARI is aware of this distinction, and has been requested to submit materials that would bear on the ongoing investigation of the rates of all commodities, including non-ferrous scrap.

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